SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 526

UNITED STATES OF AMERICA, APPELLANT,

vs.

THE UNITED STATES CARTRIDGE COMPANY, APPELLEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

VOL. V

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1 (Appearance of Counsel for Appellant.)

United States Court of Appeals for the Eighth Circuit

No. 14389

UNITED STATES OF AMERICA, APPELLANT

vs.

THE UNITED STATES CARTRIDGE COMPANY

The Clerk will enter my appearance as Counsel for the Appellant.

HOLMES BALDRIDGE,
Assistant Attorney General,
Claims Division.
DRAKE WATSON,
United States Attorney.
MARVIN C. HOPPER,
Assistant United States Attorney.

Of Counsel:

J. GREGORY BRUCE,
Acting Chief, Frauds Section.
GEORGE W. MEUTH,
CHARLES W. TAYLER,
Attorneys, Department of Justice.

(Endorsed): Filed in U. S. Court of Appeals, Jul. 9, 1951.

2 (Appearance of Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

R. H. McROBERTS,
1630 Boatmen's Bank Bldg.,
St. Louis 2, Mo.

(Endorsed): Filed in the U. S. Court of Appeals, Jan. 14, 1952.

ORDER OF SUBMISSION

September Term, 1951

Saturday, May 10, 1952.

This cause having been called for hearing in its regular order, argument was commenced by Mr. George W. Meuth, Assistant to Chief of Frauds Section, Claims Division, Department of Justice,

for appellant, continued by Mr. Robert H. McRoberts for appellee, and concluded by Mr. J. Gregory Bruce, Chief of Frauds Section, Claims Division, Department of Justice, for appellant.

Thereupon, this cause was submitted to the Court on the printed record of appellant, the supplemental printed record of appellee and the briefs of counsel filed herein.

3 OPINION

United States Court of Appeals for the Eighth Circuit

No. 14,389

THE UNITED STATES CARTRIDGE COMPANY, APPELLEE

vs.

THE UNITED STATES CARTRIDGE COMPANY, APPELLEE

Appeal from the United States District Court for the Eastern District of Missouri

August 8, 1952

George W. Meuth, Assistant to Chief of Frauds Section, Claims Division, and J. Gregory Bruce, Chief of Frauds Section, Claims Division, (Holmes Baldridge, Assistant Attorney General, Claims Division, George L. Robertson, United States Attorney, William V. O'Donnell and Marvin C. Hopper, Assistant United States Attorneys, and Charles W. Tayler and Douglas J. Titus,
4 Attorneys, Department of Justice, were with them on the brief) for Appellant.

Robert H. McRoberts (Marion S. Francis, Thomas V. Connelly, and Bryan, Cave, McPheeters & McRoberts were with him on the brief) for Appellee.

Before SANBORN, JOHNSEN, and COLLET, *Circuit Judges*

SANBORN, *Circuit Judge:*

The Government has appealed from a judgment dismissing an action brought by it under Sections 3490 to 3492, inclusive, of the Revised Statutes of the United States (31 U.S.C., 1940 Ed., §§ 231-233) to recover from the defendant (appellee) the forfeitures and double damages prescribed by Section 3490 for the commission of any of the acts prohibited by Section 5438 of the Revised Statutes (18 U.S.C., 1940 Ed., § 80), including the making or presenting of false, fictitious, or fraudulent claims and false certificates to obtain the payment of such claims.[1] The Government contends that,

[1] Sec. 3490. "Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the

under the evidence and the applicable law, the District Court should have entered judgment for the Government against the defendant for $214,878,725.12.

The action was originally brought December 21, 1943. An amended complaint was filed February 9, 1945. The amended complaint was amended October 7, 1946. The case came on for trial June 12, 1950. The District Court's opinion, including its findings and conclusions, was filed January 16, 1951 (95 F. Supp. 384), [2] and judgment was entered on that day.

The defendant, a wholly-owned subsidiary of the Western Cartridge Company, of East Alton, Illinois, operated, under the general supervision of the Ordnance Department, the Government-owned St. Louis Ordnance Plant for the mass production of small arms ammunition (.30 and .50 caliber cartridges) for the armed forces under a cost-plus-a-fixed-fee contract with the Government. The contract was entered into in December, 1940. The St. Louis Ordnance Plant was not then in existence. The contract recited that the Government contemplated entering into a contract with the Western Cartridge Company for the construction of the plant

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acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, title 'CRIMES', shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

Sec. 5438. "Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * *" shall be imprisoned or fined.

These statutes are referred to as the "False Claims Statute".

[2] The record on appeal shows that the opinion was filed January 16, 1951. The opinion as reported indicates the filing date as November 21, 1950.

under the supervision of that Company, and desired to have the defendant, "as an independent contractor on a cost-plus-a-fixed-fee basis, make all necessary preparations for the operation of said plant, including the training of operating personnel (other than the key personnel required to be trained by Western under the terms of its contract with the Government previously referred to), but excluding the procurement and supervision of the installa-
6 tion of manufacturing facilities; and operated said plant. * * *"

The manufacture of ammunition at the plant started on November 11, 1941, before the plant was completed. Apparently the plant was not completed until the spring of 1942. It consisted of 300 buildings having about 4 million square feet of floor space. It had eight complete manufacturing units and a capacity of 12,000,000 rounds of ammunition every 24 hours. About 1200 persons were on its supervisory staff, and at times the plant employed as many as 36,000 workers on three shifts. During its operation, which continued throughout the duration of hostilities in World War II, the plant manufactured about 7 billion rounds of ammunition.

This controversy between the Government and the defendant grew out of the defendant's alleged failure to maintain a proper system of inspection and to produce the quality of ammunition called for by the contract.

The contract contained the following provision under Title I ("Operation"), Article I-F "Contractor's Inspection System":

"The Contractor shall maintain a satisfactory system of inspection, gaging and gage checking concurrent with manufacture, and no ordnance material shall be submitted for the Government inspector's approval which has not previously been inspected by agents of the Contractor and found to be up to the contract standard."

Reduced to its lowest terms, the claim upon which the complaint of the Government is based is that between February 1, 1942, and September 30, 1943, the claims presented by the defendant for its fixed fee, together with the certificates supporting such claims, were false, fictitious, or fraudulent because the defendant
7 during that period resorted to certain schemes, tricks, and devices in connection with the manufacture, inspection, and packing of the ammunition produced, which caused defective ammunition to be intermingled with each lot of ammunition, rendering all of the lots unsuitable for use; that the acceptance of this ammunition by the Government was brought about by the fraudulent practices of the defendant, of which the Government was ignorant; and that the Government paid the false claims presented by the

defendant in reliance upon its false certificates and representations that the claims were correct and just.[3]

The defendant in its answer denied that it had made or pre-

[3] The amendment of the complaint, filed October 7, 1946, alleged:

"(5) The following schemes, tricks, and devices were employed by the defendant, its officers, agents, or employees at its said plant between February 1, 1942 and October 31, 1943, without the plaintiff's knowledge, in connection with the manufacture of .50 caliber and .30 caliber armor-piercing, tracer, or ball ammunition under the said contract:

"(a) On October 16, 1942 the defendant did submit some 700,000 rounds of .50 caliber ammunition for acceptance by the United States without having subjected the same to satisfactory visual inspection. This was accomplished by placing skids of ammunition within the U. S. Ordnance Department area as having been fully visually inspected and ready for acceptance, whereas such ammunition had been in fact only 'spot-checked' or not finally inspected at all.

"(b) On sundry occasions between May 1, 1942 and October 1943 the defendant submitted for acceptance by the United States .50 caliber ammunition as Grade A which had not passed the inspection requirements for Grade A. It had been agreed between the United States and defendant that certain types of ammunition would not be submitted for acceptance except as Grade B. The defendant nevertheless did cause the acceptance by the United States as Grade A of several hundred thousand rounds of ammunition which could properly have been accepted only as Grade B. by removing surreptitiously cards placed with boxes of Grade B ammunition and substituting therefor cards indicating that the ammunition was Grade A.

"(c) On sundry occasions between March and September 1942 the defendant did cause to be packed quantities of .30 caliber ammunition which had not been submitted to the United States for sampling and testing. This was accomplished by causing skids or boxes of ammunition to be removed from the inspection area to the packing area, and causing such ammunition to be packed as part of the accepted lots.

"(d) Between March and September 1942 defendant did cause to be packed quantities of .50 caliber ammunition which had been rejected by the United States or by defendant's own inspectors or which had not been submitted for approval by the United States. This was accomplished by placing quantities of such ammunition with lots which were being made ready for packing at times when representatives of the United States had finished taking their samples or were temporarily absent from the place where the ammunition was stacked, and packing the same as part of accepted

sented false claims or certificates, or employed any of the schemes, tricks, or devices with which it was charged, or that the Government had sustained any damage by reason of the payment of the

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lots. In connection therewith, the powder lot numbers on cards accompanying the rejected lots were altered to correspond falsely with powder lot numbers on the lots with which they were surreptitiously placed.

"(e) On sundry occasions between February 1, 1942, and October 1943 defendant did submit for acceptance by the United States .50 caliber ammunition which had been previously submitted and rejected, without causing the same to be reinspected as required, or after causing only random or spot checking to be performed, and did also submit ammunition which had been rejected by defendant's own inspectors, by surreptitiously placing quantities of such rejected ammunition on skids or carriages which were being submitted to the United States for acceptance.

"(f) It had been understood and agreed by and between the United States and the defendant that starting in June 1943 no ammunition which had been previously rejected by the United States would be resubmitted except when accompanied by a certificate in writing by an agent of the defendant that the ammunition mentioned or described in such certificate had been subjected to machine gauging and weighing after rejection and before resubmission. The defendant nevertheless, during the period from June to September 1943, in connection with the submission of .50 caliber ammunition, did make, use, or cause to be made or used, certificates which were false and contained to defendant's knowledge fraudulent or fictitious statements or entries, in that such certificates stated or certified falsely that lots of ammunition had been regauged and reweighed as agreed upon between the United States and defendant under the terms of said contract, when in fact such lots had not been regauged or reweighed.

"(g) It was also a part of the aforesaid fraudulent schemes that the weighing and gauging machines be set in such a way as to permit considerable variance from the desired dimensions or weights, and thus fail to throw out cartridges which varied to a greater extent than a maximum tolerance.

"(h) It was further a part of said fraudulent schemes and practices that production inspection requirements other than weight and gauge, final visual, and test firing were avoided in that on numerous occasions between February 1942 and October 1943 the defendant caused and permitted defective component parts of cartridges to flow into production and thereby become a part of the lots of ammunition which said defendant caused the United States to accept by reason of the fraudulent practices and subterfuges described in subparagraphs (a) to (g) of this paragraph (5)."

claims in suit. The defendant set up a number of defenses, some of which were, on motion of the Government, eliminated by the court. (See *United States* v. *United States Cartridge Co.*, 78 F. Supp. 81.) The defendant alleged that, by the terms of the contract, all work, including the handling of funds, was to be performed at the expense and risk of the Government, and that it had agreed to indemnify and hold the defendant harmless against any loss, expense, damage or liability of any kind arising out of or in connection with the performance of the work, except to the extent that such loss, expense, damage or liability might be due to the personal failure on the part of the corporate officers of the defendant or of other representatives of the defendant having supervision and direction of the operation of the plant as a whole, to exercise good faith or that degree of care which they normally would exercise in the conduct of the defendant's business. The defendant further alleged that, by the terms of the contract, it was agreed that the defendant should not be liable for any failure in the performance of the contract except to this same extent, and that none of its corporate officers and none of its representatives having supervision and direction of the plant as a whole had any knowledge of the making of any false, fictitious, or fraudulent claims or certificates or of the doing of the acts or things charged against the defendant in the complaint as finally amended. The defendant alleged that nothing of which the Government complained was due to the personal failure of the corporate officers of the defendant or of any representative of the defendant having supervision and direction of the operation of the plant as a whole.

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The issues were tried by the District Court without a jury. The Government introduced much testimony tending to show that during the period in suit there was a failure on the part of the defendant to maintain an adequate and satisfactory system of inspection during the process of manufacture of ammunition; that some ammunition was improperly graded; that rejected ammunition was resubmitted for acceptance without being reworked; that defective ammunition was intermingled with other ammunition; that ammunition which had not been submitted to nor accepted by the Government was surreptitiously intermingled and packed with accepted ammunition; and that, as a result of the tricks, schemes, and devices alleged by the Government, much of the ammunition produced during the period in suit was substandard and failed when used by the armed forces.

The defendant's evidence was to the general effect that no substantial irregularities in the maintenance of the established system of inspection had taken place; that the system of inspection set up was adequate and satisfactory; that any

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breakdowns in the system were due to the sporadic and isolated acts of employees acting contrary to their instructions; and that none of the schemes, tricks, or devices of which the Government complained were known to, approved, or ratified by the corporate officers of the defendant or any of its representatives having supervision and direction of the plant as a whole, or were the result of any failure of such officers or representatives to exercise good faith or that degree of care which they would normally have exercised in the conduct of the defendant's business.

The District Court in an exhaustive opinion dealt in detail with every aspect of this controversy. 95 F. Supp. 384. We shall endeavor to refrain from needless repetition. We do not understand that the District Court's recital of the evidentiary facts is seriously challenged, the Government's contention being mainly that the court's findings as to the ultimate facts were induced by an erroneous view of the law.

11 The ultimate basis for the dismissal of the case by the District Court is stated in the court's opinion as follows (page 428 of 95 F. Supp.):

"It is our conclusion the plaintiff has failed to sustain its burden of proof. This record fails to present substantial evidence there was personal failure on the part of the corporate officers of defendant, or defendant's agent or agents having supervision and direction of the operations of the plant as a whole, to exercise good faith or that degree of care which they normally exercised in the conduct of defendant's business, so that such failure resulted in fraud in the presentation to the plaintiff of a false claim under the False Claim Statute."

In arriving at that conclusion the District Court refused to impute to the defendant knowledge of, or to hold it responsible for, the misconduct of certain subordinate employees upon which the Government largely relied to establish that the defendant was guilty of having made and presented the allegedly false claims in suit. This refusal of the court was based mainly upon the following provisions of the contract:

"Title I

Operation

* * * * * * *

"Article I-B—Statement of Work.

* * * * * * *

"9. It is the understanding of the parties hereto, and the intention of this contract, that all work, including the handling of funds, under this Title I is to be performed at the expense and risk of

the Government and that the Government shall indemnify and hold the Contractor harmless against any loss, expense, damage or liability of any kind whatsoever arising out of or in connec-
12 tion with the performance of the work under this Title I, except to the extent that such loss, expense, damage or liability is due to the personal failure on the part of the corporate officers of the Contractor or of other representatives of the Contractor having supervision and direction of the operation of the Plant as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of the Contractor's business.

* * * * * * *

"Title III

General Provisions

* * * * * * *

"Article III-F—Special Provisions.

* * * * * * *

"5. * * * It is further understood and agreed that the Contractor shall not be liable for any failure or delay in the performance of this contract, or accountable for the loss or destruction of or damages to any materials, tools, machinery, equipment, supplies, Ammunition or other property located or stored at said Plant or used in connection with the operation thereof except to the extent that such failure, delay, loss, destruction or damage is due to the personal failure on the part of the corporate officers of the Contractor or of other representatives of the Contractor having supervision and direction of the operation of the Plant as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of the Contractor's business."

The Government contends that if these provisions limiting liability are construed to exempt the defendant from constructive knowledge of or from responsibility for the fraudulent acts of its subordinate employees, the provisions are void because in
13 derogation of the False Claims Statute, contrary to public policy, and beyond the authority of the officer who entered into the contract on behalf of the Government.[4]

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[4] The Contracting Officer was Brigadier General L. H. Campbell, Jr. The approval of the contract was recommended by C. M. Wesson, Major General, Chief of Ordnance, and the contract was approved "By direction of the Secretary of War," by Robert P. Patterson, The Assistant Secretary of War.

The views of the District Court as to the validity and scope of the provisions of the contract limiting liability are stated as follows (pages 415-416 of 95 F. Supp.):

"These contract provisions were inserted at the instance and on the insistence of Mr. Olin, President of Western. Plaintiff approached him on the subject of construction and operation of the Plant. The Plant had not then reached blueprint stage, nor had its location been determined. The parties negotiated the contract, and in doing so dealt at arms length. Neither was compelled to contract or accept the contract on the terms set forth. There is no claim of failure on the part of either party to understand the terms of the contract. We assume each of the parties in negotiating the contract acted fairly and in good faith. In determining purpose and intent of the parties as to the interpretation that should be given to these liability limitation provisions, we take the language in its accepted meaning. The contract is not vague. Consider the surrounding circumstances. Defendant was undertaking a promotional obligation of immense size. Thousands of untrained workers would be necessary to carry on the operation. The plant must be built, equipped and placed in operation under the pressing necessity of effecting early and continuous production of ammunition in large quantities to meet a national emergency. Mr. Olin was a man experienced in the manufacture of ammunition. He must have envisaged there would be manifold problems presented in the requirement that untrained labor in large numbers be used. That he at least tried to limit defendant's liability for the conduct of this multitude of employees, who at that time were unknown, does not appear strange or unreasonable. Plaintiff is now asking
14 for a judgment for $214,878,725.12, based on defendant's liability for each and every act of each and every employee involved in the activities complained of, regardless of the origin or authority for the conduct of such employees. While defendant may not have foreseen this character of claim, or any specific character of claim for that matter, Mr. Olin doubtless saw a possibility of claims coextensive with the enormity of the proposed plant and its operation.

"Plaintiff argues the limitation of liability provisions were not intended by the parties to cover liability for fraud in submission of a false claim by an employee. We cannot read such an exception into the contract under its terms. There are no exceptions in the sections in Titles I and III. We cannot rewrite the contract. The contract does not enumerate specifically acts for which liability is limited in the two titles. It uses broad terms. We construe it to cover liability for any 'failures' in manufacture and delivery of ammunition under the contract. That is what it says in plain English. Recovery is now sought on the theory of 'failure' to

comply with the contract. A 'failure' of such nature and extent as to constitute fraud in law and liability under the false claim statute. If there is no 'failure' in the manner stated, there can be no recovery.

"Plaintiff further contends the liability limitation provisions are against public policy. Plaintiff cites no authority so holding. We find none. The contract was made by a responsible officer of the plaintiff. He had authority to act. Would plaintiff imply this officer entered into a contract with defendant that would in execution, as to a provision repeated four times, do injury to the public good? The contracting officer's authority has not been questioned. Like the contracting officer, we see nothing in the contract of such an offensive nature as to place it in the class of agreements void because against public policy. Wherein does it do injury to the public good? Defendant was given no unbridled authority to proceed under the contract. The contract is replete with provisions for plaintiff to retain control over the operation of the plant and its personnel, even though they are designated as defendant's employees. Plaintiff could cancel the contract at will or could cause the discharge of any employee. The manner in which the work was done must meet plaintiff's approval. Defendant was not relieved of all liability by the contract. Liability was conditioned."

The contract in suit was made pursuant to the Act of July 2, 1940, 54 Stat. 712-714, 50 U.S.C. Appendix, § 1171, § 1172. That Act authorized the Secretary of War to provide for the construction of munition plants and for the manufacture of munitions "at such places and under such conditions as he may deem necessary." It also authorized him, with or without advertising, to provide for the operation of any such plant "either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them." The only express limitation on the authority of the Secretary to contract was that the cost-plus-a-percentage-of-cost system of contracting should not be used.

The contract in suit, like other similar contracts, was the product of its time and environment. When it was executed, the Government was faced with the imminence of war, the necessity of providing for the mass production of ammunition in huge quantities in the shortest possible time, the problem of finding men with the ability and experience to construct and equip the necessary plants, to recruit the essential labor force in a highly competitive labor market, and to operate the plants after they were constructed and equipped. Congress, we think, clearly intended to give the Secretary of War virtually a free hand in providing the means for meeting the emergency which then existed.

It is necessary to keep in mind that at the time of the execution of this contract there was no St. Louis Ordnance Plant, that
16 the defendant had no labor force to operate it when constructed, and that in order to put such a plant in operation it would be necessary to recruit and train many thousands of completely unskilled persons in the art of manufacturing ammunition. It is apparent that, while the defendant was willing to undertake the recruiting and training of the necessary labor force and to manage the plant for the Government at its expense and under its supervision, the defendant was not willing to assume the risk of, or liability for, the misconduct of those employed at the plant, other than the personal misconduct of the defendant's own corporate officers and other representatives having supervision or direction of the plant as a whole.

While it has been definitely settled that the status of the defendant was that of an independent contractor and that the employees at the plant were its employees (*Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 506-508), it cannot be gainsaid that they were all working at a Government plant on Government machines, making Government ammunition out of Government raw materials, under Government supervision, and were paid out of Government funds. The Contracting Officer representing the Government had the right under the contract to "require the Contractor to dismiss from the work any employee the Contracting Officer deems incompetent or whose retention is deemed to be not in the public interest * * *." The Government also had the right to terminate the contract at any time upon reasonable notice.

The Government contends that, notwithstanding the provisions of the contract relieving the defendant of liability for the misconduct of subordinate employees at the plant, they were as a matter of law employees of the defendant, for whose acts it was legally responsible and of whose misdoings it was necessarily charged with knowledge.

17 The general rule is that a corporation is liable for the torts and wrongful acts of its employees acting within the scope of their authority or the course of their employment. 13 Am. Jur., Corporations, § 1118, page 1043; 19 C.J.S., Corporations, § 1260, page 946; 13 Am. Jur., Corporations, § 1125, page 1050; 19 C.J.S., Corporations, § 1278, page 955; *State of Missouri, on Inf. Taylor* v. *American Insurance Co.*, 355 Mo. 1053, 1113-1115, 200 S.W. 2d 1, 40-43; *Egan* v. *United States*, 8 Cir., 137 F. 2d 369, 379; *United States* v. *Armour & Co.*, 3 Cir., 168 F. 2d 342; *United States* v. *George F. Fish, Inc.*, 2 Cir., 154 F. 2d 798, 801.

It is also the general rule that a corporation is charged with knowledge of all material facts of which an officer or agent acquires knowledge while acting in the course of his employment and within

the scope of his authority. 13 Am. Jur., Corporations, § 1110, page 1035; 19 C. J. S., Corporations, § 1078, pages 613-614; *Maryland Casualty Co.* v. *Tulsa Industrial Loan & Investment Co.*, 10 Cir., 83 F. 2d 14, 16.

The Government therefore argues that the defendant was bound by the knowledge of those of its employees who, during the course of their employment, committed or participated in committing fraudulent practices, and hence must be held to have known that it was making claims for a fixed fee to which it was not entitled and which was in fact unearned.

The Government also asserts, in effect, that since the False Claims Statute is for the protection and benefit of the public and "to provide for restitution to the Government of money taken from it by fraud" *(United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 551), and since the provisions of the contract limiting the defendant's liability for the misconduct of employees below a certain level are contrary to the public policy expressed by
18 the statute and contrary to good morals, the provisions of the contract limiting the defendant's liability were void or ineffective. It is well settled, of course, that the law will not sustain a covenant of immunity which protects against fraud, contravenes public policy, is prejudicial to the public welfare, is contrary to good morals, or relieves one of a duty imposed by law for the public benefit. 12 Am. Jur., Contracts, § 182, page 683; 38 Am. Jur., Negligence, § 8, page 649; *Ganley Brothers, Inc.*, v. *Butler Brothers Building Company*, 170 Minn. 373, 212 N. W. 602, 603; *Scott* v. *Beams*, 10 Cir., 122 F. 2d 777, 784, certiorari denied 315 U. S. 809.

There is substance in the Government's argument. While the defendant was in reality, we think, an instrumentality of the Government, chosen by it to operate at its risk and expense the munitions plant in suit, the contract provided that the defendant's status should be that of an independent contractor and not that of an agent of the Government, and also provided that the employees at the plant were not Government employees but employees of the defendant. If this contract were to be regarded as one creating the conventional relationship between the Government and a commercial corporate contractor not subject to Government supervision and control, for the supplying of goods or services, and if the provisions limiting liability were to be viewed merely as an attempt to relieve such a contractor from liability for its own fraud, the Government's argument might perhaps be unanswerable.

But this was not a conventional Government contract made under normal conditions; it was an unusual arrangement made to meet a crisis. As Judge Johnsen said of this same contract in his concurring opinion in *United States Cartridge Co.* v. *Powell*, 8

Cir., 174 F. 2d 718, 726: "The scheme, which is involved in the present situation, of producing munitions in government-
19 owned plants, 'through the agency of selected qualified commercial manufacturers,' on the basis of cost plus a fixed fee for carrying on the operations, with title to both the materials used in and the products manufactured resting at all times in the United States, was admittedly a novel and revolutionary set-up in the field of American industrial life. The 'Statement of Labor Policy,' issued jointly by the War and Navy Departments on June 22, 1942, with the approval of the President of the American Federation of Labor and the Chairman of the Congress of Industrial Organizations, characterized it in this language: 'The industrial units thus created are unique. * * * These plants embody a new and tripartite relationship among Government, labor, and management.' "[5]

The Secretary of War, under the statutory authority conferred upon him, unquestionably by the contract in suit undertook to allocate the risks and obligations which were to be assumed by the defendant and those which were to be borne by the Government. He could have operated the plant himself with Government personnel. He could, no doubt, have employed the defendant to operate it with Government employees. He chose to do neither, but agreed to relieve the defendant from the hazards which would arise from the wrongdoing of employees at the plant other than the defendant's own corporate officers and those of its representatives having supervision and direction of the plant as a whole. We think the Secretary was not compelled to require the defendant to assume entire responsibility for the undisclosed wrongdoings of the myriad of employees it was obligated to hire, under adverse conditions, in order to operate the plant, but was authorized to limit the defendant's risks in that regard to whatever extent he deemed necessary in order to secure its managerial serv-
20 ices to produce, under Government supervision, ammunition for the armed forces.

If the District Court and this Court are wrong with respect to the validity or effect of the provisions of the contract upon which the dismissal of this action was based, the Government will, as it contends, be entitled to a new trial, since the District Court held that, if the knowledge of certain employees at the plant of misconduct resulting in unaccepted ammunition being packed for shipment with accepted ammunition was by imputation the knowledge of the defendant, then certain of the claims and certificates

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[5] This statement was not impaired by the reversal of our decision in that case by *Powell* v. *United States Cartridge Co.*, 339 U. S. 497.

in suit were false and fraudulent. (See pages 414 and 415 of 95 F. Supp.) We refrain, however, from any consideration or discussion of questions which can be of consequence only in case of a new trial.

The judgment appealed from is affirmed.

21 (JUDGMENT)

United States Court of Appeals for the Eighth Circuit

No. 14389

September Term, 1951.

Friday, August 8, 1952.

UNITED STATES OF AMERICA, APPELLANT,

vs.

THE UNITED STATES CARTRIDGE COMPANY.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

August 8, 1952.

22 (Clerk's Certificate.)

United States Court of Appeals for the Eighth Circuit.

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript composed of five volumes contains record printed by appellant and filed January 11, 1952, composed of two volumes, Volume I consisting of pages a to 464, inclusive, Volume II consisting of pages 465 to 909, inclusive; appendix to brief of appellant filed February 7, 1952, composed of one volume, Volume III, consisting of pages 1 to 95, inclusive; and supplemental record printed by appellee and filed April 25, 1952, composed of one volume, Volume IV, consisting of pages 1 to 97, inclusive, on which the appeal from the United States District Court for the Eastern District of Mis-

souri was heard in the United States Court of Appeals for the Eighth Circuit, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in said Court of Appeals, composed of one volume, Volume V, consisting of pages 1 to 23, inclusive, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Court of Appeals wherein United States of America was Appellant and The United States Cartridge Company was Appellee, No. 14389.

I do further certify that on the 26th day of August, A. D. 1952, a mandate was issued out of said Court of Appeals in said cause, directed to the Judges of the United States District Court for the Eastern District of Missouri.

23 In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, on the 11th day of December, A. D. 1952.

E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit. (Seal)

24 Supreme Court of the United States, October Term, 1952.

No. ———

UNITED STATES OF AMERICA, PETITIONER,

vs.

THE UNITED STATES CARTRIDGE COMPANY.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 2, 1953.

FRED M. VINSON,
Chief Justice of the United States.

Dated this 28th day of October, 1952.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 526

UNITED STATES OF AMERICA, PETITIONER

v.

THE UNITED STATES CARTRIDGE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled cause on August 8, 1952.

OPINIONS BELOW

The opinion of the District Court (R. 319-398) [1] is reported at 95 F. Supp. 384. The opinion of the Court of Appeals (R. V, 2-15) is reported at 198 F. 2d 456.

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1952. The time within which

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[1] All record references are to Volume I of the Record, unless prefaced by a different volume number, *e.g.*, "R. V, 2" refers to page 2 of Volume V of the Record.

to file a petition for a writ of certiorari was extended by order of Chief Justice Vinson, dated October 28, 1952, to and including January 2, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a War Department contracting officer was empowered by the Act of July 2, 1940, to limit the respondent contractor's liability, under the False Claims Statute, for defrauding the United States.

2. Whether such power, if it existed, should be held to have been exercised in the absence of language expressly indicating a purpose to exonerate the contractor, under the False Claims Statute, from liability for defrauding the United States.[1a]

STATUTES AND CONTRACT PROVISIONS INVOLVED

The pertinent portions of the Act of July 2, 1940 (54 Stat. 712, 50 U.S.C. App. 1171, 1172) and of the False Claims Statute (R.S. 3490-3492, 5438, 31 U.S.C. 233, 18 U.S.C. (1946 ed.) 80) are set forth in Appendix A, *infra*, pp. 22-24. The pertinent provisions of the contract between respondent and the United States are in Appendix B, *infra*, pp. 24-26.

STATEMENT

This suit was brought by the United States under the False Claims Statute (*infra*, pp. 23-24) to

[1a] See also fn. 6, *infra*, p. 6.

recover double damages and statutory forfeitures, totaling $214,878,725.12, by reason of respondent's alleged fraudulent claims for fixed fees under its contract with the Government to manufacture munitions at the Government-owned St. Louis Ordnance Plant. The case concerns the same contract which was before this Court in *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, 499-501.

The amended complaint [2] alleged that during the period from February, 1942, through September, 1943, respondent practiced certain fraudulent schemes and tricks in connection with the manufacture, inspection and packing of ammunition causing defective ammunition to be accepted and paid for by the United States. The answer (R. 190) denied the fraud, asserted that the Government had sustained no actual damages, and set up various defenses including provisions of the contract which respondent contended exculpated it from liability under the False Claims Statute.[3] The case was tried without a jury and the findings of fact are those set forth in the District Court's opinion (R. 319-398).

Respondent is a subsidiary of Western Cartridge Co. (now Olin Industries, Inc.) which in 1940 was

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[2] Originally filed in December, 1943 (R. 1), the complaint was amended February 9, 1945 (R. 4) and again October 7, 1946 (R. 15).

[3] Respondent's affirmative defenses Nos. 9 to 16 (R. 194-196), alleging that the claim was barred by the Final Termination Contract entered into by the parties pursuant to the Contract Settlement Act of 1944, 58 Stat. 649, 41 U. S. C. 101 *et seq.*, were stricken on motion by the Government. *United States* v. *U. S. Cartridge Co.*, 78 F. Supp. 81 (E.D. Mo.); R. 309-317.

one of the two major organizations in this country with substantial experience in the field of ammunition for war purposes (R. 321). On December 5, 1940, respondent executed a cost-plus-fixed-fee contract with the Government to provide "management service covering supervision, direction and control of the production aspects" (R. 330) of the St. Louis Ordnance Plant for the manufacture of small arms ammunition (.30 and .50 caliber cartridges). The contract declared (R. 198) that it was authorized by the Act of July 2, 1940 (*infra*, pp. 22-23). The Government agreed to pay "all costs and expenses of every character and description", including reimbursement to respondent for ammunition finally rejected (R. 331), plus a fixed fee for each 1000 rounds of ammunition which was accepted, "packed and ready for shipment" (R. 330, 331, 205-207). Respondent was required to maintain "a satisfactory system of inspection" and not to submit ammunition for acceptance by the Government inspectors which it had not previously inspected and found to be up to the contract standard (R. 331).

The contract contained four different clauses, inserted at respondent's insistence (R. 329-331; II, 761-762), limiting respondent's liability. One provided that the Government would hold respondent harmless against "any loss, expense, damage or liability of any kind whatsoever arising out of or in connection with the performance of the work" (R. III, 3); another declared that respondent "shall not be liable for any failure or delay in the

performance of this contract" (R. III, 6-7).[4] Under each clause, the limitation of liability was inapplicable to the extent that the loss, liability, failure in performance, etc., was "due to the personal failure on the part of the corporate officers of the [respondent] or of other representatives of the [respondent] having supervision and direction of the operation of the Plant as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of the [respondent's] business."

The plant was large, consisting of eight complete manufacturing units with a total capacity of 12,000,000 rounds of ammunition each 24 hours (R. V, 4). During maximum production as many as 36,000 persons were employed at one time, many of whom had inspection and testing duties (R. 324; V, 4). But only three persons had "supervision or control over the plant as a whole" (R. 380).

At trial, the United States introduced much evidence to show that substantially all the schemes and tricks set out in the complaint were practiced (R. V, 7). As the trial court found, these included the submission of ammunition which had not been subjected to the required visual inspection (R. 338-342); the upgrading of ammunition by changing cards on Grade B ammunition to indicate it was

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[4] These clauses are set out in Appendix B, *infra*, pp. 24-26. The other two clauses provided that the Government would reimburse respondent for all losses not compensated by insurance or otherwise (R. III, 4), and would exempt respondent from failure to take advantage of trade discounts, rebates, etc. (R. III, 4-5).

Grade A and submitting it for acceptance as Grade A (R. 342-349); and the resubmission of rejected ammunition without the required reinspection or rework (R. 349-357). There was also evidence—though the trial court found these lapses to be careless rather than deliberate—of the alteration of gauging and weighing machines so as to permit improper variance from specifications (R. 357-360), and of the avoidance of other testing requirements (R. 360-364).[5] Concerning these charges of fraud, the District Court concluded that the United States had failed to establish that the ammunition involved had actually been defective or had been accepted or that any damage resulted, and that, in the absence of such proof, there was no fraud within the coverage of the False Claims Statute (R. 341, 346, 352, 359, 362).[6]

However, the District Court did find fraud which was actionable under the statute in that quantities

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[5] The District Court found that in the latter part of 1942 and 1943, while the American forces were engaged in the African and Italian campaigns, misfires of cartridges caused guns to jam in planes. This minimized or destroyed the striking power of the planes, subjected the fliers to danger, lowered their morale, and it is not known how many fliers failed to return from combat because of this. Some of the ammunition causing the trouble was traced to the St. Louis Ordnance Plant. (R. 327-328).

[6] In the Court of Appeals, the Government contended that, in order to show a violation of the False Claims Statute, it was unnecessary to prove that the ammunition involved had actually been defective or had been accepted by the Government or that any damage had resulted. In our view, the Court of Appeals did not pass upon this point, and therefore it is not ready for presentation to this Court. If, however, the court below did pass upon and reject this contention, we reserve the right to present it in the event certiorari is granted.

of ammunition which had not been submitted to or accepted by the Government inspectors were surreptitiously removed by respondent's employees from the inspection area to the packing area where they were intermingled with accepted ammunition and were then packed and shipped (R. 364-374).[7] But the District Court held that relief was barred by the exculpatory provisions of the contract (*supra*, pp. 4-5; *infra*, pp. 24-26); that this was an action for " 'failure' to comply with the contract" (R. 375); that the contract relieved respondent from liability for failure to perform the contract unless such failure is traceable to the three persons (R. 380) having supervision over the plant as a whole; that petitioner failed to establish their participation in the fraud, and, accordingly, the action should be dismissed.

The Court of Appeals for the Eighth Circuit affirmed (R. V, 2-15). The court acknowledged that a corporation is generally liable for the wrongful acts of its employees and is charged with the knowledge such employees acquire within the scope of their employment; that the law will not sustain a covenant of immunity against fraud or relieving one of a duty imposed by law for the public benefit; and that the False Claims Statute is for the protection of the public and provides for the restitution to the Government of money taken from it by fraud. In a normal situation, it said, this argument as

[7] If the Government's claim in this suit is limited to these frauds alone, we estimate the claim would amount to between $3,000,000 and $18,000,000, in double damages plus statutory forfeitures.

to the invalidity of the contract clauses "might perhaps be unanswerable" (R. V, 13). However, the court found that the situation was not normal, that the Act of July 2, 1940 (*infra*, pp. 22-23) under which the contract was written created an unusual arrangement and that the Secretary of War had authority, and exercised it, to limit respondent's liability in accordance with the exculpatory and indemnity clauses as construed by the District Court.[8]

REASONS FOR GRANTING THE WRIT

The language and the legislative history of the False Claims Statute (*infra*, pp. 23-24) are singularly expressive of a forceful public policy protecting the Government against frauds, particularly war frauds.[9] Passed during wartime, the Statute implements the Government's common law rights and remedies for fraud[10] by criminal sanctions, civil forfeitures, and double damages. Indeed, Congress went even further and offered large rewards to *qui tam* plaintiffs to ensure the vigorous prosecution of actions to recover damages for frauds perpetrated against the Government.[11] The decision below holds that such a potent public policy may be

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[8] The Court of Appeals did not pass upon those of the trial court's findings of fact which the Government contended were clearly erroneous or based upon an erroneous legal theory. See fn. 6, *supra*, p. 6.

[9] *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537.

[10] *United States* v. *Silliman*, 167 F. 2d 607, 610-611 (C.A 3), certiorari denied, 335 U. S. 825; *Pooler* v. *United States*, 127 Fed. 519 (C.A. 1).

[11] *United States* v. *Baker-Lockwood Mfg. Co.*, 138 F. 2d 48, 52 (C.A. 8).

nullified at the will of a contracting officer simply by his inserting a general exculpatory clause in a government contract which virtually waives the application of the Statute as against a particular contractor.

It is settled, of course, that no government official may dispense with the requirements of law or relinquish rights of the United States without clear warrant from Congress.[12] The court below attempted to find warrant for the exercise of this extraordinary power in the Act of July 2, 1940, *infra*, pp. 22-23. Its holding, however, is fundamentally inconsistent with the reasoning of this Court's decision in *Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497, 520-521, where the Court considered the 1940 Act and its impact upon the very contract involved here. Moreover, in reaching its conclusion, the court below adhered to views it had expressed in a prior concurring opinion[13] which this Court expressly rejected in *Powell, supra.* And even if the decision below is correct in reading the 1940 Act as conferring upon a contracting officer the power to immunize a contractor from liability under the False Claims Statute, the court erred in holding that such power was intended to be, or could be, exercised by the general language used in the "exculpatory" clauses on which respondent relies. In both its branches, the decision below will lead to

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[12] *Hart* v. *United States*, 95 U. S. 316, 318; *Munro* v. *United States*, 303 U. S. 36, 41; *Case* v. *Terrell*, 11 Wall. 199, 202.

[13] *United States Cartridge Co.* v. *Powell*, 174 F. 2d 718, 726-730 (C.A. 8).

difficulties in future enforcement of the False Claims Statute and tends to encourage fraud and irresponsibility in connection with government contracts.

1. No statute, we submit, should be construed as waiving or suspending, or as permitting any executive officer to waive or suspend, the provisions of the False Claims Statute unless Congress has indicated its intention to do so by clear and manifest language. Cf. *Powell* v. *United States Cartridge Co.*, 339 U. S. 497, 520; *Posadas* v. *National City Bank*, 296 U. S. 497, 503; *Maresca* v. *United States*, 277 Fed. 727, 737 (C. A. 2), certiorari denied, 257 U. S. 657. In the absence of an unambiguous expression of congressional intent, such a construction is contrary to the vigorous and long standing public policy manifested in the False Claims Statute. As its terms make clear, the Act of July 2, 1940 was not designed to intrude upon that public policy.

Section 1 of the Act (*infra*, pp. 22-23) authorized the Secretary of War, with or without advertising, to provide for the construction of munition plants (Sec. 1(a)(1)) and to provide for the manufacture of munitions "at such places and under such conditions as he may deem necessary" (Sec. 1(a)(2)). The Secretary was empowered "to enter into such contracts * * * as he may deem necessary to carry out the purposes specified in this section" (Sec. 1(a)(3)). The Secretary was also authorized "to provide for the operation and maintenance" of such plants "either by means of Gov-

ernment personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them" (Sec. 1(b)). There was a prohibition on contracting under a "cost-plus-a-percentage-of-cost system" but the Act authorized "the use of the cost-plus-a-fixed-fee form of contract" (Sec. 1(a)(3)). The Act expressly suspended specified laws which would otherwise have limited the War Department but did not include among these the False Claims Statute.[14]

Despite the limited character of these provisions, the Court of Appeals found in the Act a congressional intention "to give the Secretary of War virtually a free hand" in contracting under the Act subject only to a single limitation, *viz.*, that the cost-plus-a-percentage-of-cost system of contracting should not be used (R. V, 11).[15] This conclusion that the Act granted authority to a contracting officer to limit or extinguish rights and remedies

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[14] As stated by this Court in *Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497, at 520-521, one purpose of the Act of 1940 was: "the clarification of the contract-making authority of the War Department under existing general law, with such exceptions as were expressly noted * * * *e.g.*, requirements of the congressional approval of estimates and the making of appropriations prior to undertaking construction of certain buildings (§ 1(a)), restrictions on leasing (§ 1(b)), restrictions on the assignment of personnel (§ 2(b)), limitation on the number of serviceable aircraft (§ 3), and restrictions as to civil service employees (§ 4(a))."

[15] Compare the statement on the floor of the House by a member of the House Committee on Military Affairs that in meeting the needs of the national defense, the bill represents "the minimum that should be authorized. There is possibly a great deal of feeling in the committee that it ought to be larger, but we thought it best to move steadily and cautiously, and it was all that the President had asked." 86 Cong. Rec. 6823.

conferred by Congress by a prior law, not expressly suspended by the Act, is incorrect and wholly inconsistent with this Court's opinion in *Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497.

The question in the *Powell* case was whether the Act of July 2, 1940, or the action of the Secretary of War taken pursuant to it in executing the very contract now before the Court, excluded the application of the Fair Labor Standards Act.[16] The question here is the same except that the statute involved is the False Claims Statute. The Court concluded in *Powell* (339 U. S. at 520):

> * * * Without more specific provisions than this Act contains, we cannot interpret it as excluding, or as granting, authority to executive officers to exclude, employees in such plants from the benefits of the general wage and hour provisions which Congress has established in the Walsh-Healey Act and more fully and recently in the Fair Labor Standards Act.[17]

The reasoning of the opinion, in direct contradiction to that of the decision below, is dispositive of the question here presented. The Court, observing that Congress had established benefits in the Fair Labor Standards Act, held that the application of that Act was not precluded (a) by any unique rela-

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[16] 52 Stat. 1060, *et seq.*, 53 Stat. 1266, 54 Stat. 615-616, 55 Stat. 756, 61 Stat. 87, 63 Stat. 446, 910-920, 29 U.S.C. 201-219, 29 U. S. C. (Supp. III) 201-217.

[17] See also the statement at p. 521: "No suggestion was made [in the Act of 1940] of a suspension of part or all of the Fair Labor Standards Act, *nor was anything authorized that would violate that Act.*" (Emphasis added.)

tionship arising from contracts authorized by the Act of July 2, 1940, because no such peculiar relationship existed; (b) nor by the language of the 1940 Act, because those restrictions which were intended to be suspended by that Act were expressly mentioned, while the Fair Labor Standards Act was not mentioned "nor was anything authorized that would violate that Act"; (c) nor by the fact that the Secretary of War had, through the contract now in suit, excluded the claimants from receiving the benefits conferred, because the 1940 Act cannot be interpreted as granting authority to executive officers to exclude benefits established by Congress. 339 U. S., at 520-521.

Each of these reasons the Court assigned in *Powell* for holding that the Fair Labor Standards Act was applicable is equally pertinent here with reference to the False Claims Statute; indeed, more so. The language and legislative history of the 1940 Act make no reference whatever to the False Claims Statute, just as they made none to the Fair Labor Standards Act.[18] The Fair Labor Standards Act relates to conduct which can be called *malum prohibitum*, the False Claims Statute to conduct *malum per se*. The Fair Labor Standards Act was enacted in 1938 without particular reference to war or defense programs, while the False Claims Statute was

[18] The legislative history was considered in the *Powell* case, 339 U. S. at 520-521. The False Claims Statute was not referred to either in the Committee Reports or in the debates, but those statutes which were intended to be affected were explained and discussed. H. Rep. 2261, 2578, 2685, 76th Cong., 3d Sess.; 86 Cong. Rec. 6821-6862, 7839-7851, 7921-7931. See also fn. 15, *supra*, p. 11.

especially aimed at frauds attempted in connection with wartime contracts. Nothing in the 1940 Act is repugnant to the continued application of the False Claims Statute, just as there is no repugnancy in applying the Fair Labor Standards Act. Nor can it be said that vigorous enforcement of the False Claims Statute would impede the defense effort which the 1940 Act was designed to strengthen and expedite, for a contractor owes the strictest duties of absolute honesty in all dealings with the United States [19], and it is inconceivable that the duties owed are any less in time of war than in time of peace. [20] Yet the construction of the 1940 Act given by the court below results in permitting a contracting officer to subtract from or wipe out those duties and negate the predominate public policy embodied in the False Claims Statute. [21]

In *United States ex rel. Marcus* v. *Hess, supra,* 317 U. S. 537, at 542, this Court declined to adopt a construction of the civil remedy provisions of the

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[19] See, *Muschany* v. *United States,* 324 U. S. 49, 59; *Rock Island Etc. R. R.* v. *United States,* 254 U. S. 141, 143.

[20] A contention that the war effort might be injured or impeded unless provisions of the False Claims Statute were suspended was expressly rejected by this Court in *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537, 547.

[21] The court below pointed to language of the 1940 Act authorizing the Secretary of War to contract for the manufacture of munitions "at such places and under such conditions as he may deem necessary" (R. V, 11). Compare this language with that of the Air Corps Act of July 2, 1926, 44 Stat. 780, 785, 10 U. S. C. 310(c), empowering the Secretary to contract with winners of aircraft design competitions "on such terms and conditions as he may deem most advantageous to the Government" for furnishing the aircraft. So far as we know, it has never been suggested that these broad terms of the Air Corps Act authorize the Secretary to relieve a contractor from all or part of his liability under the False Claims Statute.

False Claims Statute which would operate to nullify its criminal provisions, for this "would be to exercise a veto powers which is not ours." The decision below construes the 1940 Act as conferring upon a contracting officer authority to exercise such a veto power over the civil provisions of the Statute—and to choose, in his discretion, the particular contractor who is to be the recipient of this extraordinary bounty.

It is especially difficult to read the general and unexceptional words of the Act as authorizing this dispensing power, because the exercise of the authority would result in validating an "exculpatory" provision which would otherwise be illegal as opposed to public policy. See 6 Williston on *Contracts* (Rev. Ed.), pp. 4964-4967. Although the Government may not be relieved from an improvident agreement (*United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289), contract provisions will be declared void if they conflict with a predominant public policy stemming from laws and governing decisions (see *Muschany* v. *United States*, 324 U. S. 49, 66). The public policy embodied in the False Claims Statute is promoted by vigorous prosecution of the rights and remedies there created and is contravened by a contract not to do so. Cf. *Pope Mfg Company* v. *Gormully*, 144 U. S. 224, 235. In particular, a clause such as in this case—limiting liability except for personal failure of very top officials—suffers from two major vices. It invites and encourages irresponsibility on the officials' part and the adoption of procedures which would isolate them from the day-to-day operation of the plant. It also deprives the United

States of restitution for fraud, for it can hardly be supposed that the lesser employees are financially able to meet the burden of damages, and at the same time it, in effect, permits the contractor to retain the fruits of the fraud. [22]

2. The opinion below has reverted to views expressed in the concurring opinion of the Eighth Circuit in *United States Cartridge Co.* v. *Powell*, 174 F. 2d 718, 726-730, despite the fact that this Court flatly rejected those views when it reversed the *Powell* case, 339 U.S. 497, 520. The Court of Appeals' decision here is footed squarely on the premise that a contract under the 1940 Act creates a unique relationship, so unique as to remove it from established principles which, under the conventional type of Government contract and in normal times, would invalidate provisions purporting to immunize a contractor from liability under the False Claims Statute for defrauding the Government (R. V, 13). This is the same view which the concurring opinion in the *Powell* case expressed with regard to the Secretary's power to suspend operation of the Walsh-Healey Act [23] and

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[22] Respondent cannot be heard to complain if it in good faith believed it was buying a virtual immunity from liability under the False Claims Statute, for the Government is neither bound nor estopped by unauthorized acts of its agents. *Federal Crop Ins. Corp.* v. *Merrill*, 332 U. S. 380, 384; *Whiteside* v. *United States*, 93 U. S. 247, 257.

[23] In the concurring opinion, discussing the applicability of the Walsh-Healey Act (49 Stat. 2036, *et seq.*, 41 U.S.C. 35, *et seq.*) and the Fair Labor Standards Act, to the contract here in suit, it was asserted that contracts under the 1940 Act for private operation of government-owned facilities created a "novel", "revolutionary", "unique" and "hybrid" relationship; that the 1940 Act failed to provide expressly

it flies directly in the face of this Court's language, 339 U.S., at 520:

> We find in the Act of July 2, 1940, no such recognition of the uniqueness of War Department contracts for the private operation of Government-owned munitions plants as is claimed in the concurring opinion below in the *Powell* case.[24]

Further, the court below placed reliance upon other circumstances previously rejected by this Court, such as the facts that the plant, raw materials and product were owned by the Government (R. V, 12), that the Government had the right to require dismissal of employees (*ibid.*), that the contract was executed during critical times (R. V, 11), and that the Statement of Labor Policy of the War and Navy Department, issued on June 22, 1942, described the arrangement as "new" and "unique" (R. V, 14). Each of these factors was considered and discussed in the *Powell* case and was negated as indicative of a unique relationship. See 339 U.S., at 500-501, 506-508, 520, 522. It seems clear that the decision below is rested squarely on grounds which this Court has recently

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that such relationship should be governed by the Walsh-Healey Act (which is applicable to most Government contracts); that the 1940 Act granted "a reservoir of power in the Secretary of War" to act independently of the wage and hour provisions of the Walsh-Healey Act or of any other statute; but that he had nevertheless provided by contract to abide by the provisions of the Walsh-Healey Act. Four of the seven judges of the court below, sitting *en banc*, joined in the concurring opinion; of those, two participated in the instant case.

[24] This appears immediately before the sentence we quoted, *supra*, p. 12.

characterized as without merit. Cf. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 73; *Chesapeake & Ohio Ry. Co.* v. *Kuhn*, 284 U.S. 44, 46-47.

3. Even assuming that the contracting officer had the power to waive the provisions of the False Claims Statute, we submit that the power was neither intended to be nor was it exercised here. Such a potent and unusual power should not be held to have been exercised unless the purpose to do so is expressed in unmistakable language. Far from explicit words setting aside the False Claims Statute, all that the exculpatory clauses attempt to do is excuse ordinary failures of contract performance.

a. The indemnity clause provided that the Government would hold respondent harmless against "liability of any kind whatsoever arising out of or in connection with the performance of the work", and the exculpatory clause declared that respondent "shall not be liable for any failure or delay in the performance of this contract" (*infra*, pp. 25-26). Both courts fell in error when they assumed the present action to be for " 'failure' to comply with the contract" (R. V, 10-11) and therefore within the terms of those clauses.[25] There is an

[25] When the United States has been defrauded, it may pursue not only those rights that a private party to a contract would have in like circumstances (*United States* v. *Silliman*, 167 F. 2d 607, 610-611 (C.A. 3), certiorari denied, 335 U. S. 825; cf. *United States ex rel. Marcus* v. *Hess*, *supra*, 317 U. S. at 550) but, in addition, those granted by the False Claims Statute. The Government's rights—and respondent's liabilities—under the False Claims Statute are apart from and independent

obvious distinction between a contractor's failure to perform the acts which are the subject of his contract and a contractor's deliberate and affirmative fraud in presenting false vouchers to deceive the Government. Manifestly, the "performance" to which the clauses relate is the performance which is the subject of the contract, *viz.*, respondent's managerial services. Those services, rather than honesty and a promise not to defraud, were the subject of the contract. Respondent's obligation not to cheat and defraud the Government arose from the relationship between the parties, not from the performance promised under the contract.[26] There are many situations where the creation of a relationship will result in obligations being imposed by operation of law, without regard to the intent of the parties, some of which may be contracted away; others may not.[27] If duties imposed by the False Claims Statute can be contracted away, this contract did not do it, for the exculpatory provisions referred not to the obligations arising from the relationship but to the performance contracted for.

b. Contractual provisions attempting to ex-

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of any provisions of the contract; the statute applies to any person violating it "without regard to whether that person had direct contractual relations with the government." *United States ex rel. Marcus* v. *Hess*, 317 U. S., at 545.

[26] Cf. *Muschany* v. *United States*, 324 U. S. 49, 59; and see, *Kenney* v. *Wong Len*, 81 N. H. 427, 438, 128 Atl. 343, 349.

[27] See, Note, 37 Col. L. Rev. 248 (1937); 6 Williston on *Contracts* (Rev. Ed.), pp. 4968-4977; Pound, *Law as Developed in Juristic Thought*, 30 Harv. L. Rev. 201, 213 (1917). Cf. *Pope Mfg. Company* v. *Gormully*, 144 U. S. 224, 234-235.

culpate or indemnify one party from the consequences of his own future wrongs are not favored at law and are strictly construed against the party relying on them.[28] This rule of strict construction is especially apt where, as here, the contractor would otherwise be relieved of one of the obligations imposed by Congressional mandate and the Government deprived of remedies for the restitution of money taken from it by fraud. Contracts are not to be read so "that one party [is] to be placed at the mercy of the other." *Wood* v. *Duff-Gordon,* 222 N.Y. 88, 91. Even where the attempted exculpation involves negligence, rather than fraud, the authorities are overwhelming that, where the contract provision does not refer expressly to negligence, negligence is not included in the exemption.[29] Ignoring this principle of narrow construction, which is adhered to by other Courts of Appeals, the court below found that the

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[28] The District Court found a distinction between a contract to expulpate for one's own fraud, which it acknowledged to be illegal (R. 376), and a contract exculpating one from the fraud of his agent, which it held valid (R. 378). Corporations, of course, can only act through agents and servants. We suggest that the former rule applies when a corporation with as many as 36,000 employees attempts to relieve itself of all fraud except that attributed to corporate officers and but *three* employees (R. 380). See, *Liverpool Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397, 441.

[29] E.g., *Sinclair Prairie Oil Co.* v. *Thornley,* 127 F. 2d 128, 133 (C.A. 10); *Southern Ry. Co.* v. *Coca-Cola Bottling Co.,* 145 F. 2d 304, 307 (C.A. 4); and see cases cited in 175 ALR 8, at 30 fn. 11. See also, *Doughnut Machine Corp.* v. *Bibbey,* 65 F. 2d 634-7 (C.A. 1); *Buckeye Cotton Oil Co.* v. *Louisville & N. R. Co.,* 24 F. 2d 347, 348 (C.A. 6); *North American Ry. Const. Co.* v. *Cincinnati Traction Co.,* 172 Fed. 214, 216 (C.A. 7); *United States* v. *Wallace,* 18 F. 2d 20, 21 (C.A. 9).

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parties intended to include fraud within the coverage of the clauses despite the fact that fraud is nowhere mentioned or alluded to in the instrument itself nor is there any evidence in the record that either party had it specifically in mind (R. 375).[30] It is important to correct this error so that immunity provisions in Government contracts be kept within the limited bounds laid down by the parties and by controlling principle. Review by this Court is needed to provide guideposts to contracting officers in negotiating and formulating Government contracts and procurement policies.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WALTER J. CUMMINGS, JR.,
Solicitor General.

DECEMBER 1952.

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[30] The certification on each voucher submitted by respondent for services under the contract expressly referred to the False Claims Statute, thus indicating that the parties did not intend that the contract waive its provisions (R. 334).

APPENDIX A

The Act of July 2, 1940, 54 Stat. 712-714, 50 U.S.C. App. 1171, 1172, provides in pertinent part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) in order to expedite the building up of the national defense, the Secretary of War is authorized, * * * with or without advertising, (1) to provide for the necessary construction, * * * of plants, * * * for the * * * manufacture * * * of military equipment, munitions, and supplies * * * (2) to provide for the * * * manufacture, * * * of military equipment, munitions, and supplies * * * at such places and under such conditions as he may deem necessary; and (3) to enter into such contracts * * * as he may deem necessary to carry out the purposes specified in this section: *Provided* * * *, That the cost-plus-a-percentage-of-cost-system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.
>
> (b) The Secretary of War is further authorized, with or without advertising, to provide for the operation and maintenance of any plants * * * constructed pursuant to the authorizations contained in this section * * *, either by means of Government personnel or through the agency of selected qualified com-

mercial manufacturers under contracts entered into with them * * *.

* * * * *

The pertinent provisions of the False Claims Statute are—

1. Section 3490 of the Revised Statutes (12 Stat. 698, 31 U.S.C. 231, which reads as follows:

> Sec. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "Crimes", shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

2. Section 5438 of the Revised Statutes (12 Stat. 698, 18 U.S.C. (1946 Ed.) 80) as it appeared at the time of its incorporation in Section 3490, which reads as follows:

> Sec. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or

naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * * every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars.

APPENDIX B

Contract No. W-ORD-491, entered into between the United States and respondent on December 5, 1940, provides in pertinent part:

Title I

Operation

* * * * *

Article I-B—Statement of Work

* * * * *

9. It is the understanding of the parties hereto, and the intention of this contract, that all work, including the handling of funds, under this Title I is to be performed at the expense and risk of the Government and that the Government shall indemnify and hold the Contractor harmless against any loss, expense, damage or liability of any kind whatsoever arising out of or in connection with the performance of the work under this Title I, except to the extent that such loss, expense, damage or liability is due to the personal failure on the part of the corporate officers of the Contractor or of other representatives of the Contractor having supervision and direction of the operation of the Plant as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of the Contractor's business.

* * * * *

Title III-F—Special Provisions

* * * * *

5. If the performance of any work under this contract is interrupted or prevented by reason of inability to obtain equipment or essential materials to be used in the manufacture of the Ammunition, or by reason of labor shortage or labor disputes, from whatever cause arising, and whether or not the demands of the employees involved shall be reasonable and within the Contractor's power to concede, or by reason of fire, explosion, accident, sabotage,

or any cause beyond its control, whether of a nature similar or dissimilar to those hereinbefore set forth, the Contractor shall be excused from performing work or manufacturing Ammunition while or to the extent that it is prevented from so doing by one or more of such causes, and all such work shall be performed and such Ammunition shall be manufactured as soon as practicable after such disability is removed. It is further understood and agreed that the Contractor shall not be liable for any failure or delay in the performance of this contract, or accountable for the loss or destruction of or damages to any materials, tools, machinery, equipment, supplies, Ammunition or other property located or stored at said Plant or used in connection with the operation thereof except to the extent that such failure, delay, loss, destruction or damage is due to the personal failure on the part of the corporate officers of the Contractor or of other representatives of the Contractor having supervision and direction of the operation of the Plant as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of the Contractor's business.

* * * * *

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

UNITED STATES OF AMERICA,
Petitioner,

vs.

THE UNITED STATES CARTRIDGE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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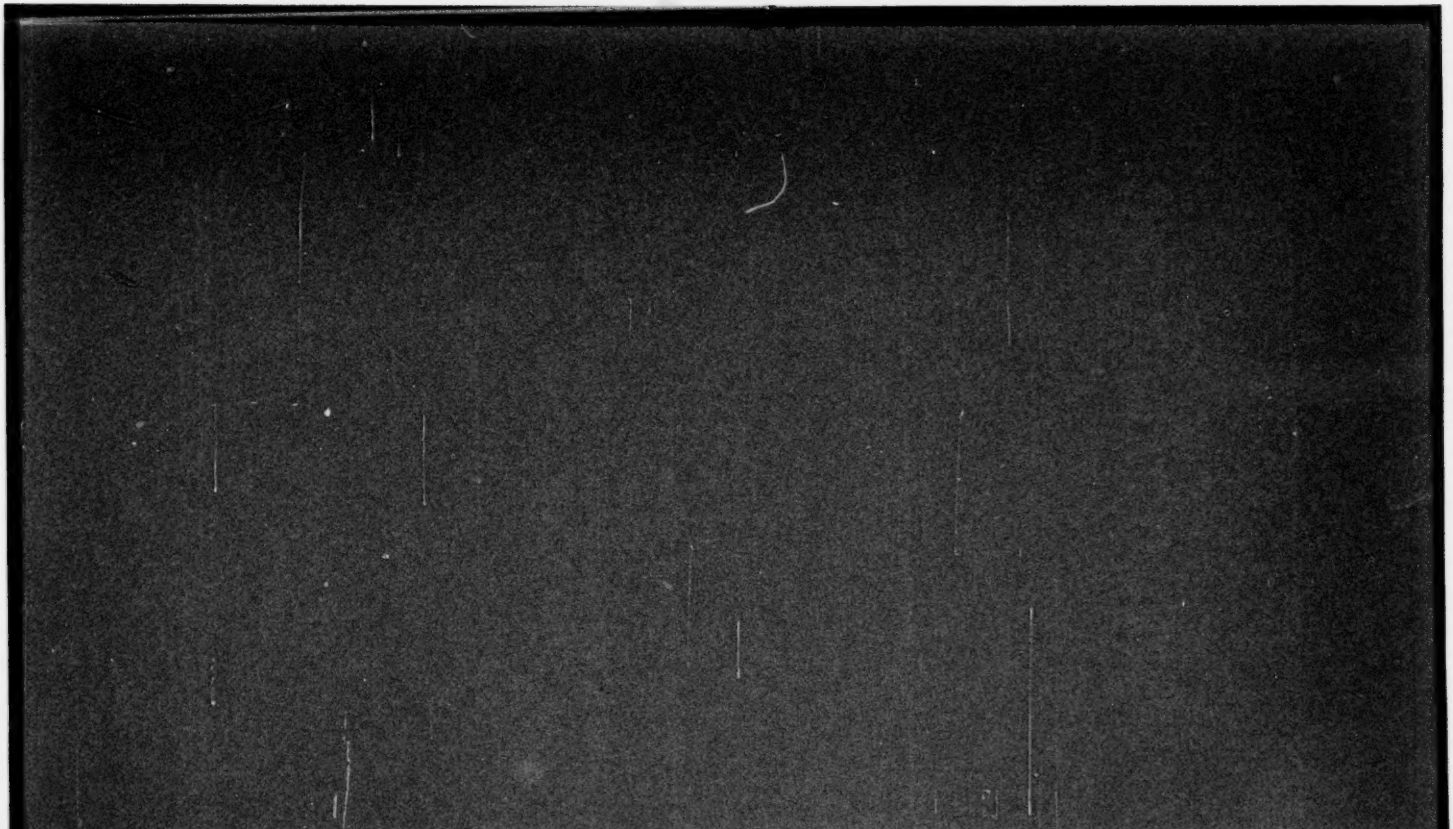

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No. 526.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

UNITED STATES OF AMERICA,
Petitioner,

vs.

THE UNITED STATES CARTRIDGE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

THE OPINIONS BELOW.

The opinion of the District Court (R. Vol. I, pp. 319-398) is reported in 95 F. Supp. 384. The opinion of the Court of Appeals (R. Vol. V, pp. 2-15) is reported in 198 F. (2d) 456.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 8, 1952 (R. Vol. V, p. 2). The time within which to file the petition for writ of certiorari was extended by order of Chief Justice Vinson on October 28, 1952, to and including January 2, 1953 (R. Vol. V, p. 16). The jurisdiction of this Court is invoked under Section 1254 of the Revised Judicial Code (28 U. S. C. 1254).

QUESTIONS PRESENTED.

As will be hereinafter more fully developed in the Statement and Argument, there is a vital distinction, we believe, between the questions which this lawsuit actually presented to the Courts below and the questions stated in the Petition for the Writ of Certiorari (p. 2), as being presented thereby. Having in mind this distinction, we submit that the questions stated in the Petition were not presented to and not decided by either of the Courts below, were never in the case at all, and hence are not properly before this Court. On the contrary, if any questions are properly presented by said writ they are merely questions of general contract law and may be stated substantially as follows:

1. Whether contractual provisions limiting liability for any failure in the performance of a contract except for "personal failure" on the part of the corporate officers or responsible representatives, may be construed to relieve the contractor from imputed knowledge of the isolated acts of a few out of many thousands of lower level employees, in the absence of any actual knowledge of such acts?

2. Whether such contractual provisions, if they be construed to relieve respondent from such imputed knowledge, are valid?

STATUTES AND CONTRACT PROVISIONS INVOLVED.

The pertinent provisions of the *False Claims Act* (12 Stat. 698, 31 U. S. C. A. 231, and 18 U. S. C. [1946 Ed.] 80), of the Act of July 2, 1940 (54 Stat. 712-714, 50 U. S. C. App. 1171, 1172), and certain of the pertinent provisions of the contract between petitioner and respondent, are set forth in the Appendix to the Petition (pp. 22-26), and, in the interest of brevity, are not herein repeated.

STATEMENT.

The Contract.

The respondent was employed by the Government to operate the St. Louis Ordnance Plant for the manufacturing of small arms ammunition under the terms of a contract dated December 5, 1940 (R. Vol. I, pp. 198-230). The description of the contract contained on pages 4 and 5 of the Petition, is adequate for present purposes, except that it should be noted that under the terms of this contract all that the respondent undertook to do, as the contract twice specifically stated, was to "make every reasonable effort to manufacture ammunition conforming to the specifications," and the Government "recognized that variances therefrom are unavoidable" (R. Vol. I, pp. 202, 209).

Government Approval of Results Accomplished.

The task which the respondent undertook to perform was one of tremendous magnitude, beset with many difficulties and complexities, to which the respondent, its officials and responsible representatives, gave their utmost efforts. The results which the respondent accomplished and the quality of the ammunition produced, were described by representatives of the Ordnance Department in terms of "very efficient" (R. Vol. II, p. 815) and "very satisfactory" (R. Vol. II, p. 816).

Under date of August 30, 1946, long after the filing of this suit, and long after the Government was fully advised with respect to all of the matters complained of therein, the Government, after due investigation and negotiation, and review and approval by the War Department Contract Termination Review Board, entered into a contract which recited that "the Contracting Officer, as evidenced by his execution of this instrument, has administratively deter-

mined that the Contractor has satisfactorily completed all of its work and satisfactorily performed all of its obligations under the contract," with certain exceptions which did not relate to the subject matter of this suit (Deft. Ex. 265, p. 3).

Isolated Irregularities of Lower Level Employees.

But, despite everything the respondent could do, and did do, it is true that out of the more than 86,000 employees who were employed by the respondent during the course of the respondent's operation of the St. Louis Ordnance Plant, some few of the employees in the lower levels, on a few occasions, without any actual knowledge of, and directly contrary to the express instructions of, the corporate officers and responsible representatives of the respondent, through negligence, willfulness, or perhaps mere ignorance, failed to do what they were supposed to do, or did what they were supposed not to do, in the performance of their tasks in the manufacturing, inspecting, packing and delivering of ammunition. As the Trial Court said (R. Vol. I, p. 381):

> "With employees in excess of thirty thousand much of the time, over three eight hour shifts, we think it would have been an industrial miracle if there had been no failure, no wrongdoing, no negligence, on the part of employees, considering the type of employee and nature of the work."

It is on the basis of the imputation to the respondent of the knowledge which such employees had of their own irregular acts (in the absence of any actual knowledge) that the Government seeks to recover in this case.

ARGUMENT.

I.

No Important Question of Federal Law Was Decided Below, Nor Was Any Federal Question Decided in a Way Probably in Conflict With Applicable Decisions of Supreme Court.

Before discussing the actual scope, effect and correctness of the decisions below, we deem it necessary to repudiate and to attempt to correct the completely unjustified impression which the Government's petition seeks to create as to what questions were presented to, and decided by, the Courts below.

1. The Court of Appeals Did Not Decide Either of the Questions Stated in the Petition for a Writ of Certiorari as Being Presented Thereby, Nor Was Either of Them Ever in the Case at All.

In an effort to make it appear that the Court of Appeals "has decided an important question of Federal law which has not been, but should be, settled by this Court; or has decided a Federal question in a way probably in conflict with applicable decisions of this Court";[1] the Government has stated the questions presented on its Petition for a Writ of Certiorari as follows:

> "1. Whether a War Department contracting officer was empowered by the Act of July 2, 1940, to limit the respondent contractor's liability, under the False Claims Statute, for defrauding the United States.
>
> "2. Whether such power, if it existed, should be held to have been exercised in the absence of language expressly indicating a purpose to exonerate the con-

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1 Rule 38, paragraph 5 (b) of the Rules of the Supreme Court.

tractor, under the False Claims Statute, from liability for defrauding the United States."

But the fact is, as we shall hereinafter demonstrate, that neither of these questions was presented to or decided by either the Trial Court or the Court of Appeals, nor was either of them ever in the case at all. Furthermore, no important question of Federal law of any kind was decided below or is properly presented here.

2. Errors in Describing Scope and Effect of Decisions Below.

Not only has the Government stated questions which were not decided below and are not presented here, but has gone further and, in at least five different respects, erred in describing the scope and effect of the decisions below.

(1) In the Government's petition the statement is mistakenly made (p. 6) that "the District Court did find fraud which was actionable under the statute," i. e., that the respondent had violated the False Claims Act.

(2) Then, based upon the assumption that such a finding was actually made, the Government states or assumes that the Courts below held that the "potent public policy [exemplified by the False Claims Act] may be nullified at the will of a contracting officer simply by his inserting a general exculpatory clause in a Government contract which virtually waives the application of the Statute as against a particular contractor" (pp. 8-9); that a Government official might "dispense with the requirements of law or relinquish rights of the United States without clear warrant from Congress" (p. 9); that the decision below read the Act of July 2, 1940, "as conferring upon a contracting officer the power to immunize a contractor from liability under the False Claims Statute" and that "such power was intended to be, or could be, exercised by

the general language used in the exculpatory clauses upon which respondent relies" (p. 9); that the Court construed the Act of July 2, 1940 "as waiving or suspending, or as permitting any executive officer to waive or suspend, the provisions of the False Claims Statute" (p. 10); that "the Act granted authority to a contracting officer to limit or extinguish rights and remedies conferred by Congress by a prior law, not expressly suspended by the Act" [of July 2, 1940] (pp. 11-12); that "the construction of the 1940 Act given by the court below results in permitting a contracting officer to subtract from or wipe out those duties and negate the predominate public policy embodied in the False Claims Statute" (p. 14); that "The decision below construes the 1940 Act as conferring upon a contracting officer authority to exercise such a veto power over the civil provisions of the Statute—and to choose, in his discretion, the particular contractor who is to be the recipient of this extraordinary bounty" (p. 15); that the provisions in the contract are "provisions purporting to immunize a contractor from liability under the False Claims Statute for defrauding the Government" (p. 16); and that the Court below held "that the contracting officer had the power to waive the provisions of the False Claims Statutes" (p. 18).

(3) Next, it is said that the District Court held "that this was an action for 'failure' to comply with the contract" (p. 7), and that both courts "assumed the present action to be for 'failure' to comply with the contract" (p. 18).

(4) Then, it is said that "the opinion below has reverted to views expressed in the concurring opinion of the Eighth Circuit in United States Cartridge Co. v. Powell, 174 F. 2d 718, 726-730), despite the fact that this Court flatly rejected those views when it reversed the Powell case, 339 U. S. 497, 520" (p. 16), and that the decision below "flies

directly in the face of this court's language, 339 U. S., at 520" (p. 17).

(5) Finally, it is said that "the court below found that the parties intended to include fraud [of the respondent] within the coverage of the clauses despite the fact that fraud is nowhere mentioned or alluded to in the instrument itself nor is there any evidence in the record that either party had it specifically in mind" (p. 21).

Having set up these men of straw the government asks that review be granted in order that they may be properly knocked down by the Supreme Court. However, the truth is that there was no such finding nor any such decisions. They are not even men of straw which require knocking down, but mere illusions which will disappear when the decisions below are critically examined.

3. Correction of Errors in Describing Scope and Effect of Decisions Below.

(1) Now the fact is, as will be hereinafter specifically pointed out (pp. 15-16), that the District Court did **not** "find fraud which was actionable under the statute," i. e., that the respondent had been guilty of presenting false claims against the Government.

(2) Nor did either the District Court or the Court of Appeals decide that the Contracting Officer has the power to nullify any public policy, or dispense with any requirements of law or relinquish any rights of the United States, or to waive or suspend the provisions of the False Claims Act, or to exercise a veto power over the civil provisions of that Act, or to immunize a contractor from liability under that Act for defrauding the Government, or anything to the effect of any of such statements. As we will hereinafter point out (pp. 16-27), no such contentions were made by respondent in either Court; no such questions were presented; and no such decisions were rendered.

(3) Nor did either of the Courts below hold or assume this to be an action for failure to comply with the contract, in the sense now contended for by the Government. On the contrary, as will be more fully developed (pp. 14, 20-24), both courts clearly understood the nature of this action and the theory upon which the Government seeks to recover.

(4) Nor, as will be shown hereafter (p. 23), did the opinion below revert to any views rejected by this Court, nor does it fly in the face of the language of this Court, in its reversal of the *Powell* case.

(5) Finally, as will be hereinafter pointed out (pp. 16, 17, 22), both of the Courts below expressly recognized the rule that denies validity to a contract purporting to relieve one from his own fraud, and held that the clauses in question were not to be so construed.

4. The Actual Decisions Below.

Actually, both the District Court and the Court of Appeals merely held that the knowledge which the lower level employees of the corporation had of their own misdoings would not be imputed to the corporation in the face of exculpatory clauses limiting the corporation's liability to the "personal" failure on the part of the corporate officers or of certain other responsible representatives of the corporation to exercise good faith or that degree of care which they normally exercise in the conduct of the corporation's business, although the same result might well have been reached on other grounds.

A more complete analysis and discussion of these decisions will be found in Section II of this Argument.

We particularly challenge the statements (pp. 9-10) that "the decision below will lead to difficulties in future enforcement of the False Claims Statute and tends to encourage fraud and irresponsibility in connection with Government contracts" and (p. 21) that "It is important

to correct this error so that immunity provisions in Government contracts be kept within the limited bounds laid down by the parties and by controlling principle. Review by this Court is needed to provide guideposts to contracting officers in negotiating and formulating Government contracts and procurement policies." There will be no difficulties in the future enforcement of the False Claims Act if the Government abstains from suing where no false claims have been presented, no fraud perpetrated, and no irresponsibility shown. The immunity provisions in the present contract have, both by their terms and by the interpretation placed upon them by both Courts below, been kept within the bounds laid down by the parties and by the controlling principles by which the validity of such immunity provisions are tested by the Courts.

5. **No Question of Public Importance Presented.**

Even if the decision of the Court of Appeals be deemed to have decided a question of Federal law, in so far as it may have construed the Act of July 2, 1940, it did not decide an "important" question, within the meaning of Rule 38, Paragraph 5 (b), of the Rules of the Supreme Court, because that Act, as the Supreme Court expressly pointed out in the case of *Powell v. The United States Cartridge Co.*, 339 U. S. 497, 520, was only a "temporary" one.

By Section 1 (a) (4) of Joint Resolution of July 3, 1952, C. 570, 66 Stat. 331, it was provided that this Act should continue in force until six months after the termination of the National Emergency proclaimed by the President on December 16, 1950, or such earlier date or dates as may be provided for by Congress, but in no event beyond April 1, 1953.

To the best of our knowledge the present case, in so far as it may involve construction of the Act of July 2, 1940,

is unique. The Government has not cited, nor do we know of, a single case pending in any Court in the land presenting issues or questions such as those stated in the Government's petition for a writ of certiorari. Nor, in view of the imminent termination of that Act, is it likely that any such case will hereafter arise.

It would appear to be the policy of the Supreme Court not to grant petitions for writs of certiorari in cases arising under statutes which have expired, been repealed or been amended in a manner which would prevent the same problems from arising in the future, for the reason that the questions so presented have ceased to be of public importance. Thus the Supreme Court, in denying a petition for writ of certiorari in the case of *District of Columbia v. Sweeney*, 310 U. S. 631, pointed out that it did so "in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance." Similarly, in the more recent cases of *United States v. Abrams*, 344 U. S. 855; *Community Services, Inc., v. United States*, 342 U. S. 932; *Sokol Bros. v. Commissioner*, 340 U. S. 952, and *United States v. Beal et al.*, 340 U. S. 852, certiorari was denied, although conflicts between decisions of Courts of Appeals existed, and although a substantial number of pending or potential cases would still be controlled by resolution of the conflicts, presumably because in each case the statute upon which the controversy rested had expired or been amended in a manner which would prevent the problem from arising in the future. *Stern, Denial of Certiorari Despite a Conflict*, 66 *Harvard Law Review*, pp. 466-470.

Nor is the question as to the correct interpretation of the language of a particular provision in a specific contract, no matter what amount[2] may be involved and how vital

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2 We suggest that the Government's estimate (Footnote 7 on page 7) as to the amount of its claim based only on the items charged in Paragraphs 5 (c) and (d) of the Complaint is, proportionately, as fantastic

to the parties themselves, a question of general importance in the administration of Federal justice. As Mr. Chief Justice Hughes pointed out in an address to the *American Law Institute*, 20 A. B. A. J. 341: "That review [on certiorari], we must emphasize, is in the interest of the law, not in the interest of particular parties. It is not the importance of the parties or the amount involved that is controlling, but the need of securing harmony of decision and the appropriate settlement of questions of general importance so that the system of Federal justice may be appropriately administered." And, as pointed out in an article in 48 *Harvard Law Review* 271, referring to Rule 38 of the Rules of the Supreme Court: "The crux of its meaning is in the word 'important' ". Furthermore, as will be subsequently pointed out (pp. 28, 30), if certiorari should be granted the case can, and probably should, be decided on other grounds, so that the question as to the construction and application of the Act of July 2, 1940, may not be reached.

Accordingly, in so far as this Petition for a Writ of Certiorari is concerned, neither the District Court nor the Court of Appeals decided any important question of Federal law, nor did either of them decide any Federal question in a way probably in conflict with applicable decisions of the Supreme Court. What they actually did decide will be more fully developed in the next section of this Argument.

II.

Fundamentally, the Court of Appeals Merely Decided a Question of General Contract Law.

To correctly understand exactly what was decided below, it is necessary to consider the Government's theory of the

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as its aggregate claim based on all items charged in the Complaint. While it is impossible to name any specific figure, it is certain that but a relatively trifling amount of damages, if any, could be shown by the Government.

case, certain of the Trial Court's findings of fact, and the decision of the Trial Court, in addition to carefully examining the decision of the Court of Appeals itself.

1. Government's Theory of the Case.

Bearing in mind the magnitude of the operation which involved, in the aggregate, more than 86,000 employees, with more than 36,000 at one time, operating twenty-four hours a day, in three eight hour shifts, for six days per week, which called forth the statement of the Trial Judge that "it would have been an industrial miracle if there had been no failure, no wrongdoing, no negligence, on the part of employees, considering the type of employee and nature of the work" (R. Vol. I, p. 381), let us first examine the theory upon which the Government sought, and still seeks, to impose liability under the False Claims Act upon this respondent.

Briefly, but, we submit, accurately stated, the Government's theory of the case, as expressed in the pleadings, briefs and arguments below, is that, regardless of the contract provisions, regardless of the respondent's good faith expressly found by the Trial Court (R. Vol. I, pp. 341, 357, 397-398) and the strenuous efforts on the part of the respondent, its officials and responsible representatives, to do the job to the best of their ability, regardless of the lack of authority for, and lack of any actual knowledge on the part of the respondent of, the acts complained of, and regardless of the over-all excellence of the job done and results obtained, every time any one of its many thousands of employees, a "lowest workman" (R. Vol. I, p. 357), in violation of his instructions, did, or omitted to do, any act in the course of the multitudinous operations incident to the production of ammunition, the respondent was charged with imputed knowledge of such acts and, though without any actual knowledge thereof, committed a fraud upon the

Government when it presented its claim for a fee for services during the month in which any such act occurred, and thereby became liable for forfeitures and damages under the False Claims Act.

The Trial Judge twice described the theory upon which the case was submitted to him. First, he said (R. Vol. I, p. 375):

> "Plaintiff is now asking for a judgment for $214,878,725.12 based on defendant's liability for each and every act of each and every employee involved in the activities complained of, regardless of the origin or authority for the conduct of such employees."

Then he again summarized the Government's theory by saying (R. Vol. I, pp. 362-363):

> "* * * it appears plaintiff has adopted a theory of liability based on construction of the contract between plaintiff and defendant, that it called for a certain specific character of inspection and process of manufacture by the defendant and that any deviation would be a violation of the contract and any cartridges accepted by plaintiff during the period that such deviations occurred would constitute a violation subjecting defendant to penalties under the false claims statute."

In other words, the Government is suing because no "industrial miracle" was performed, and on the theory that the failure to perform such "industrial miracle" constituted a violation of the False Claims Act.

2. **Trial Court's Findings of Fact.**

The Trial Court found that " * * * the acts of the defendant for which plaintiff seeks relief are isolated digressions from the established system of inspection" (R. Vol. I, p. 336), committed only by "employees in the lower

levels, beyond which there were none to receive orders" (R. Vol. I, p. 383), without the actual knowledge of the corporate officers and responsible representatives of the respondent (R. Vol. I, pp. 381, 383), and with no substantial adverse effect upon the Government (R. Vol. I, pp. 341, 342, 344, 346-347, 349, 357, 358, 362, 373).[3] He found a complete failure of proof with respect to the irregularities charged in Subparagraphs 5 (a), (b), (e), (f), (g) and (h) of the Complaint, to which by far the greater part of the Government's evidence was directed, i. e., a failure to show that the effect of any such irregularity was carried through to and felt, no matter how remotely, by the Government. But, with respect to the relatively insignificant irregularities shown in support of the allegations in Subparagraphs 5 (c) and (d), which occurred during the confusion of the early months when the plant was getting into operation, he did find that the effect thereof was carried through to and felt by the Government.

The Court did not, as the Government suggests, "find fraud which was actionable under the Statute," but merely found that if the lower level employees' knowledge of their own derelictions should be imputed to the respondent, then the respondent, in presenting its claims for its fees for the month in which such derelictions occurred, would have presented such claims with imputed knowledge of the fact

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[3] Although it has not the slightest connection with the legal questions involved, the Government in Footnote 5 on page 6 of its Petition calls attention to the fact that the District Court, after finding that misfires of cartridges caused guns to jam in planes and that it is not known how many fliers failed to return from combat because of this, went on to find that some of the ammunition causing the trouble was traced to the St. Louis Ordnance Plant. But the Government omits any reference to the balance of the District Court's findings on this point that: "Some of the ammunition had been repacked after it left defendant's control. * * * During the time the Air Force was receiving this defective ammunition it was being drawn from English ammunition dumps. Subsequently, when the Air Force moved to fields near Naples and received ammunition from American dumps, defective ammunition was no longer found in unusual quantities. During the time ammunition was received from English dumps the containers showed evidence of violence which could have broken the sealed metal liners and permitted moisture to permeate and corrode the shell" (R. Vol. I, p. 328).

that the contract requirements had not been met, by reason of such irregularities, saying (R. Vol. I, pp. 373-374):

> "**If** the knowledge of defendant's employees involved in these acts can be imputed to defendant corporation and those who presented vouchers for payment of the ammunition, then presentation of pay vouchers therefor represented a false claim. They would be presented with imputed knowledge of falsity that the contract requirements had been met as to Ordnance inspection and approval. Such claims would be subject to the penalty of the false claims statute, if the contract terms do not relieve defendant." (Emphasis ours.)

3. The Decision of the Trial Court.

Thus the questions which are presented were (a) whether the knowledge of the employees engaged in such irregularities of their own improper acts was to be imputed to the respondent, and (b) whether, on the basis of such imputed knowledge (but without any actual knowledge) the Court could infer a wrongful intent, i. e., an intent to defraud, which is a requisite element of liability under the False Claims Act.[4] The Trial Court, without even considering the second question, disposed of the case on the basis of the limitation of liability provisions in the contract. Although recognizing the general proposition that "one cannot contract against his **own** fraudulent acts because that is against public policy" the Court expressly held (R. Vol. I, pp. 376-377) that:

> "The limitation of liability provisions do not release defendant of liability for fraud, even when committed by its employees. The contract conditioned such and all liability under the contract. The contract

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4 *United States v. Bittinger*, Fed. Cas. No. 14599, 24 Fed. Cas. 1150; *Morissette v. United States*, 342 U. S. 246, 72 S. Ct. 240, 96 L. Ed. 180.

places a greater burden of proof on plaintiff than would be the case but for the limitation of liability provisions. Under the contract liability arises when loss is due to personal failure of either the officers of defendant corporation or its agent having supervision and direction of the operation of the plant as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of defendant's business. Fraud of an employee of defendant, of the lowest rank, would fasten liability on defendant if it resulted from failure, either of defendant's officers or agents having supervision and direction of the operation of the plant as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of defendant's business. Conversely—absent such failure, liability does not attach if the contract means what it says and is legal."

The Court, after discussing the authorities, held that the contract "means what it says and is legal," pointing out (R. Vol. I, p. 378):

> "In the present case liability is based upon fraud and intent of the defendant is a necessary element of the offense charged. If limitation of liability clauses are sustained where negligence only need be shown, I think it follows that there is a better reason why they should be sustained where intent is an element of the offense and is sought to be proved through imputed or fictional knowledge."

The Court concluded with a finding that because of these exculpatory provisions in the contract, such knowledge would not be imputed, saying (R. Vol. I, p. 378):

> "Liability based on imputed knowledge is urged by plaintiff, but we conclude that the use of the word 'personal' takes from the case that question. By use of the word 'personal' actual knowledge on the part

of the officers or agents having authority and supervision of the operation of the plant as a whole is a necessary part of the proof for plaintiff to make his case under the contract.

"We conclude the contract should be enforced according to its terms, including the limitation of liability provision."

The Court then went on to find that there was no evidence that any of the officers or responsible representatives of the respondent had any actual knowledge of the acts in question, and that the respondent had acted in the utmost good faith and with an utter absence of any intent to defraud.

Thus the Trial Court further found that the respondent had instructed its employees "that there should be no deviation from specifications, and urging production of high quality ammunition" (R. Vol. I, p. 336); that "This was the standard for all manufacturing processes. The contract provides and the evidence shows action in accordance therewith" (R. Vol. I, p. 336). Finally, in this connection, the Trial Court found, "We think this record evidences a constant effort by management to meet the Government requirements and to operate an efficient plant but under very difficult conditions" (R. Vol. I, pp. 397-398).

On the vital question of the respondent's good faith and its lack of any intent to defraud the Government, the Trial Court found that, under all of the facts and circumstances shown in evidence, the Government's charge that the respondent would try to cheat it "taxes the imagination" (R. Vol. I, p. 397).

Finally, on the question as to the Government's failure to sustain the burden of proof, having previously (R. Vol. I, p. 334) correctly stated the issue:

> "Broadly, we are called on to determine—did the defendant by virtue of acts of its servants, for which it is responsible, make or cause to be made, and present to the plaintiff, false claims for the payment of money resulting from performance of the contract for the manufacture by defendant of small arms ammunition"

and having correctly stated the rule with respect to the burden of proof by saying (R. Vol. I, p. 335):

> "Plaintiff cannot sustain the burden of proof by offering evidence there was a false representation in the claim for money for ammunition presented to plaintiff by the defendant, but must go further and present a record containing substantial evidence on which to base a finding that the defendant in presenting the false claim did so with the knowledge of its falsity and with intent that the plaintiff would rely and act on such false representation, and that the plaintiff did believe and rely on such false representation,"

the Court correctly arrived at the ultimate conclusion (R. Vol. I, p. 398):

> "It is our conclusion the plaintiff has failed to sustain its burden of proof."

Thus no questions were presented to the Trial Court such as are stated in the Petition for the Writ of Certiorari, i. e., "Whether a War Department contracting officer was empowered by the Act of July 2, 1940, to limit the respondent contractor's liability, under the False Claims Statute, for defrauding the United States," or "Whether such power, if it existed, should be held to have been exercised in the absence of language expressly indicating a purpose to exonerate the contractor, under the False Claims Statute, from liability for defrauding the United States." No such questions were in the case and, not being presented, no such questions were decided.

4. The Decision of the Court of Appeals.

Accordingly, on appeal there was presented to the Court of Appeals the question as to the correctness of this ruling of the District Court. The Court of Appeals not only recognized but expressly stated the nature and character of the question presented to it, and which it undertook to decide, saying (R. Vol. V, pp. 7-8):

> "The defendant's evidence was to the general effect that no substantial irregularities in the maintenance of the established system of inspection had taken place; that the system of inspection set up was adequate and satisfactory; that any breakdowns in the system were due to the sporadic and isolated acts of employees acting contrary to their instructions; and that none of the schemes, tricks, or devices of which the Government complained were known to, approved, or ratified by the corporate officers of the defendant or any of its representatives having supervision and direction of the plant as a whole, or were the result of any failure of such officers or representatives to exercise good faith or that degree of care which they would normally have exercised in the conduct of the defendant's business.
>
> "The District Court in an exhaustive opinion dealt in detail with every aspect of this controversy * * *.
>
> "The ultimate basis for the dismissal of the case by the District Court is stated in the court's opinion as follows (page 428 of 95 F. Supp.):
>
> " 'It is our conclusion the plaintiff has failed to sustain its burden of proof. This record fails to present substantial evidence there was personal failure on the part of the corporate officers of defendant, or defendant's agent or agents having supervision and direction of the operations of the plant as a whole, to exercise good faith or that degree of care which they

normally exercised in the conduct of defendant's business, so that such failure resulted in fraud in the presentation to the plaintiff of a false claim under the False Claim Statute.' ''

The Court of Appeals then specifically pointed out (R. Vol. V, p. 8) that:

> ''In arriving at that conclusion the District Court refused to impute to the defendant knowledge of, or to hold it responsible for, the misconduct of certain subordinate employees upon which the Government largely relied to establish that the defendant was guilty of having made and presented the allegedly false claims in suit.''

The Court of Appeals then stated that this refusal of the District Court was based mainly upon the exculpatory provisions in the contract, and expressly restated the Government's contention that these provisions are void if ''construed to exempt the defendant from constructive knowledge of or from responsibility for the fraudulent acts of its subordinate employees'' (R. Vol. V, p. 9).

After quoting at length that portion of the District Court's opinion discussing the validity and scope of these provisions in the contract, and after citing the Act of July 2, 1940, as the specific authority for the execution of this particular contract (although not specific authority for the limitation of liability provisions), and the background against which the contract was made, the Court of Appeals expressly restated the Government's contention ''that, notwithstanding the provisions of the contract relieving the defendant of liability for the misconduct of subordinate employees at the plant, they were as a matter of law employees of the defendant, for whose acts it was legally responsible and of whose misdoings it was necessarily charged with knowledge'' (R. Vol. V, p. 12); and, again, that the Government ''argues that the defendant was

bound by the knowledge of those of its employees who, during the course of their employment, committed or participated in committing fraudulent practices, and hence must be held to have known that it was making claims for a fixed fee to which it was not entitled and which was in fact unearned" (R. Vol. V, p. 13); and that, therefore, "the provisions of the contract limiting the defendant's liability were void or ineffective" (R. Vol. V, p. 13).

The Court of Appeals, after noting the settled rule that "the law will not sustain a covenant of immunity which protects against [one's own] fraud", then (R. Vol. V, p. 13) made a twice qualified concession that:

> "If this contract were to be regarded as one creating the conventional relationship between the Government and a commercial corporate contractor not subject to Government supervision and control, for the supplying of goods or services, **and** if the provisions limiting liability were to be viewed merely as an attempt to relieve such a contractor from liability for its own fraud, the Government's argument might perhaps be unanswerable." (Emphasis ours.)

Note that the Court of Appeals postulated two assumptions: (1) that the contract be deemed a conventional one, and (2) that the exculpatory clauses merely attempt to relieve the contractor from its **own** fraud. Then, upon the basis of such assumptions, it made the doubly qualified suggestion that the Government's arrangement "might perhaps" be unanswerable. The Court of Appeals then disposed of both of such assumptions, and of the case, by determining that neither was true.

First, it held that "this was not a conventional government contract made under normal conditions; it was an unusual arrangement made to meet a crisis" (R. Vol. V, p. 13). With this conclusion we submit that it is impossible for anyone to disagree. Then, merely to emphasize the

unusual nature of this contract, and as a convenient means of doing so, the Court of Appeals quoted from its concurring opinion in the case of *The United States Cartridge Company v. Powell*, 174 F. (2d) 718, 726. It is this statement which the Government seizes upon as being a reversion to views which the Supreme Court flatly rejected when it reversed the Powell case, 339 U. S. 497, 520.[5]

Second, the Court of Appeals then disposed of its other assumption by interpreting and determining the effect of these contract provisions. In so doing, the Court of Appeals held that by these provisions the Secretary of War "unquestionably * * * undertook to allocate the risks and obligations which were to be assumed by the defendant and those which were to be borne by the Government," and "agreed to relieve the defendant from the hazards which would arise from the wrongdoing of employees at the plant other than the defendant's own corporate officers and those of its representatives having supervision and direction of the plant as a whole" (R. Vol. V, p. 14). In other words, the Court of Appeals

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5 Actually the Supreme Court did not, in the Powell case, hold that this was a conventional or usual Government contract. Nor is there anything in the decision of the Court of Appeals holding that this was not a conventional Government contract and was an unusual arrangement which is in conflict with the decision of the Supreme Court in the Powell case.

In the Powell case the Supreme Court, in construing the concurring opinion of the Court of Appeals, said, l. c. 502:

> "Four of those judges also joined in an opinion (p. 726) stating that the Act of July 2, 1940, had given discretion to the Secretary of War to determine what overtime regulations should be applicable to Government-owned privately operated plants and that, through his adoption of the Walsh-Healey Act, he had rendered the Fair Labor Standards Act inapplicable under this contract."

It was this interpretation of the Act of July 2, 1940, which the Supreme Court rejected in that portion of its opinion found in 339 U. S., at 520, which the Government now quotes (pp. 12, 17) in its Petition. There the Supreme Court merely held that it found nothing in the Act of July 2, 1940, granting authority to executive officers to waive the application of the Fair Labor Standards Act to the operation of the St. Louis Ordnance Plant. If the Court of Appeals had, in the present case, decided that the Act of July 2, 1940, had granted authority to the Secretary of War to waive the application of the False Claims Act to the respondent, i. e., to agree that the respondent might knowingly present claims against the Government which were actually false within the meaning of that Act and not be liable thereunder, an entirely different question would be presented.

construed these contract provisions as not "merely an attempt to relieve such a contractor from liability for its own fraud," but only as provisions limiting the scope of the obligations with respect to the risks and hazards of the operation which the respondent agreed to assume.

Having so interpreted and applied these contract provisions, the Court of Appeals determined that they were valid because "the Secretary was not compelled to require the defendant to assume entire responsibility for the undisclosed wrongdoings of the myriad of employees it was obligated to hire, under adverse conditions, in order to operate the plant, but was authorized to limit the defendant's risks in that regard to whatever extent he deemed necessary in order to secure its managerial services to produce, under Government supervision, ammunition for the armed forces" (R. Vol. V, p. 14).

Perhaps another example or two will better illustrate why no question of waiving the provisions of the False Claims Act, or any other Federal question, is involved in the interpretation of these contractual provisions or in the Court of Appeals' decision.

Paragraph 5 of Title III, Article III-F of the contract, quoted in Appendix B to the Government's petition, in addition to covering "any failure", also provides that the Contractor shall not be liable for any "delay in the performance of this contract" except to the extent that such delay shall be due to the personal failure of the corporate officers or responsible representatives of the Contractor. If delay had been occasioned by reason of labor or material shortages, strikes, or any reason other than the personal failure of the corporate officers or responsible representatives of the respondent, and if the Government had sued under the False Claims Act on the theory that such delay constituted a breach of the contract so that the respondent's claims for fixed fees were false claims, it would

be obvious that a dismissal of such a suit would not constitute a holding that the Contracting Officer had attempted to waive the provisions of the False Claims Act, or had decided any other Federal question.

Again, the contract specifically provides in Title III, Article III-F, Paragraph 3, that "The title to all work under this contract, completed or in the course of construction or manufacture, and to all the ammunition manufactured or in the process of being manufactured, shall be in the Government. Likewise, * * * title to all purchased materials, tools, machinery, equipment and supplies * * * shall vest in the Government. The Government shall bear all risk incident to such ownership." And in the same Paragraph 5 of said Article, that the Contractor shall not be "accountable for the loss or destruction of or damages to any materials, tools, machinery, equipment, supplies, ammunition or other property located or stored at said plant", except to the extent that the same is due to the personal failure on the part of the corporate officers or responsible representatives of the Contractor. If loss or damage to some ammunition manufactured or in the process of being manufactured, or to some raw materials, tools, machinery, etc., had occurred by reason of theft, fire, or the elements, or any reason other than the personal failure of the corporate officers or responsible representatives of the respondent, and if the Government had sued under the False Claims Act on the theory that such loss or damage constituted a breach of the contract so that the respondent's claims for fixed fees were false claims, it would be equally obvious that a dismissal of such a suit would not constitute a holding that the Contracting Officer had attempted to waive the provisions of the False Claims Act, or had decided any other Federal question.

Thus, it is apparent that what the Court of Appeals decided was not fundamentally a question of Federal law, but merely a question of general contract law. Whether

or not this be deemed a conventional Government contract, there is nothing unconventional, unusual or unique about the incorporation in a contract of such limitation of liability clauses. They are customarily found in many types of contracts, and, as will be pointed out hereafter, where they are properly drawn and limited, such provisions are uniformly upheld by the Courts. Of course, there was nothing in the Act of July 2, 1940, which specifically provided for (or prohibited) these exculpatory clauses and, as we shall hereinafter point out, the authority for including them in the contract is not derived from that Act but from the Government's general contracting powers.

The unusual nature of the arrangement created by the contract in question cannot be denied. The mere fact that the Court of Appeals for convenience quoted from its earlier opinion in order to briefly describe such arrangement is of no concern here. The Court of Appeals did not decide, as the Government suggests, that by the Act of July 2, 1940 a War Department contracting officer was empowered to limit or waive the respondent's liability under the False Claims Statute for defrauding the United States, or to nullify the public policy expressed by that Act, or to dispense with any requirements of law or relinquish any rights of the United States, or to waive or suspend the provisions of the False Claims Act, or to exercise a veto power over the civil provisions of that Act or to immunize a contractor from liability under that Act for defrauding the Government, or anything to such effect. It merely decided that a contractual provision relieving a contractor from "responsibility for the undisclosed wrongdoings of the myriad of employees it was obligated to hire, under adverse conditions, in order to operate the plant" was valid and binding upon the Government, just as it would be upon any private party.

Thus, we submit that, in the last analysis, the question submitted to and decided by the District Court and the

Court of Appeals was but a question of general contract law, and a narrow question at that. Essentially, the question was this:

> Where corporate knowledge of an employee's wrongdoing is an essential element of liability, and the corporation has no actual knowledge, will the knowledge of such employee of his own wrongdoing be imputed to the corporation where, by contract, the claimant has undertaken to limit the liability of the corporation for any acts of omission or commission on the part of its employees to "personal" failure on the part of the corporate officers and certain responsible representatives?

The District Court held that the effect of the limitation of liability provisions was to prevent the imputation to the respondent of the knowledge of certain lower level employees of their own wrongdoing, and that such limitation of liability provisions were valid. The Court of Appeals affirmed on essentially the same grounds. Neither the Act of July 2, 1940, nor any Federal Statute, was directly involved in or necessary as a basis for this, the ultimate decision.

III.

The Decision of the Court of Appeals Was Clearly Correct.

However the question or questions presented on the Petition for a Writ of Certiorari be stated, and whether or not any Federal question, important or otherwise, be involved, there can be no doubt about the correctness of the decision sought to be reviewed. The contractual provisions were properly interpreted as being intended to apply to the facts in this case. Their validity was rightly upheld.[6]

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[6] The decision being correct, this Court is not concerned with the grounds or reasons which may have been given for it. *Helvering v. Gowran*, 302 U. S. 238, 245, and cases cited.

This is neither the time nor the place to go into the merits of this lawsuit; to develop the proposition that the evidence and the Trial Court's findings of fact conclusively show that the contract, when all of its terms are read together, had **not,** in fact, been breached; that the claims for fixed fees were true and correct; and that the fixed fees covered thereby were legally due from the Government to the respondent by every standard of performance. Of course, the collection of moneys justly due under a contract which, under its own terms, has not been breached, cannot properly be made the basis of a suit under the False Claims Act. This is one of the fatal weaknesses in the Government's case. The Department of Justice is really complaining, not because the Government has been deprived, in violation of the False Claims Act, of any rights to which it was entitled, but really because the contract which the Secretary of War approved did not confer on the Government all the rights which the Department of Justice thinks that it should have conferred on the Government. Without further discussing the ultimate merits of the Government's case, we limit the balance of this brief to a discussion of (1) the correctness of the Court's interpretation of the contractual provisions, and (2) their validity and binding effect.

1. **The Interpretation of the Contractual Provisions.**

As for the interpretation of the provisions, we cannot improve upon the language of the District Court where it was said:

> "We cannot rewrite the contract. The contract does not enumerate specifically acts for which liability is limited in the two titles. It uses broad terms. We construe it to cover liability for any 'failures' in the manufacture and delivery of ammunition under the contract. That is what it says in plain English. Re-

> covery is now sought on the theory of 'failure' to comply with the contract. A 'failure' of such nature and extent as to constitute fraud in law and liability under the false claims statute. If there is no 'failure' in the manner stated, there can be no recovery" (R. Vol. I, p. 375).

The language of these provisions was as broad as it was possible to make it. They contained no exceptions which would permit them to be construed away. They purported to cover, and did cover, "any" failure, and necessarily apply to the specific failures of certain few lower level employees upon the basis of which this suit is brought.

It must be borne in mind that this is a suit brought under the False Claims Act, for the alleged presentation of false claims against the Government. Also, it is essential to remember that "knowledge," accompanied by an intent to defraud, is an essential element of liability under that Act; that, in order to recover, it must be shown not only that the respondent submitted a false claim, but that it did so "knowing such claim to be false, fictitious or fraudulent."[7]

The Trial Court found (and the Court of Appeals stated that they did not understand "that the District Court's recital of the facts is seriously challenged" [R. Vol. V, p. 8]) that the evidence completely failed to show that any corporate officer or responsible representative of the respondent participated in or had any actual knowledge of any of the irregular acts complained of. Accordingly, the only question was whether or not the knowledge of such lower level employees "beyond which there were none to receive orders" should or could be imputed to the respondent, and, on the basis of such imputed knowledge, that an intent by the respondent to defraud the Government could

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7 12 Stat. 698, 18 U. S. C. (1946 Ed.) 80.

be inferred, so that it might be said that the respondent submitted a false claim, "knowing such claim to be false, fictitious or fraudulent."

Both the District Court and the Court of Appeals answered this question in the negative, basing their conclusions as to this portion of their decisions on the limitation of liability provisions.[8]

Inasmuch as the limitation of liability provisions expressly limited liability to the "personal" failure on the part of the corporate officers or other responsible representatives of respondent, the failure of lower level employees could not, by any device of imputed knowledge, become the "personal" failure of the corporate officers or other responsible representatives.

Thus we submit the lower Court's interpretation of these limitation of liability provisions as applying to the facts in this case, and to the theory upon which the Government seeks to recover in this case, is inescapable.

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8 Although both the Courts below, in refusing to impute knowledge to the respondent and to find liability under the False Claims Act for the charges in paragraphs 5 (c) and (d) of the amended complaint, on the basis of such imputed knowledge, base their decisions on the limitation of liability provisions in the contract, the same result could well have been reached without regard thereto. First, the knowledge of an employee of his own misconduct will not be imputed to a corporation, particularly where the employee's interest is served by concealing such knowledge. *Restatement of the Law of Agency*, Section 280, page 622; 19 *Corpus Juris Secundum* 621; 3 *Fletcher on Corporations*, Sec. 819, p. 109 (Revised Volume 1947); 13 *American Jurisprudence* 1038. Second, since fraudulent intent, i. e., the intent to deceive, is a necessary element of the offense charged, even though the knowledge of the employees of their own misconduct be imputed to the respondent, the law will not, upon the basis of such imputed knowledge, infer or presume an evil intent on the part of the respondent. *Morissette v. United States*, 342 U. S. 246, 96 L. Ed. 180; *Reisan v. Mott*, 42 Minn. 49, 43 N. W. 691; *Benton v. Minneapolis Tailoring and Manufacturing Co.*, 73 Minn. 498, 76 N. W. 265; *State v. Burns*, 215 Minn. 182, 9 N. W. (2d) 518; *Matthews v. Rusk*, 262 Pa. 524, 105 A. 817, 818; *Flinn Realty Corp. v. Charter Const. Co.*, 169 N. Y. Supp. 116; *Browning v. Fidelity Trust Co.*, 250 F. 321 (3rd Cir.), cert. denied 248 U. S. 564; 2 *Mechem on Agency*, Section 1842, p. 1425. Furthermore, in the present case no fraudulent intent can be inferred or presumed because the Trial Court has expressly found good faith on the respondent's part and a complete absence of any intent to defraud (R. Vol. I, pp. 341, 357, 384, 391, 397-398).

2. The Limitation of Liability Provisions Are Valid and Binding.

As a prerequisite to any consideration of the validity of the limitation of liability provisions, it must be borne in mind that the irregular acts of certain lower level employees complained of in this case did not, per se, constitute violations of the False Claims Act. When any employee in the operation of his machine or in the performance of any inspection operation, or in the packing or delivering to the Government of completed ammunition, failed in the performance of his duty, such act of omission or commission would not constitute the presentation of a false claim against the United States, and hence could not, without more, constitute any violation of the False Claims Act, although it might constitute a failure in a minute portion of the work to be performed under the contract. Only if such failures had arisen to such magnitude that there resulted a substantial failure in the performance of the services for which respondent was being paid the fixed fees could the claims for such fees have been false claims, and only if respondent had knowledge of such failures could there have been liability under the act. But the Trial Court found the facts to the contrary and such findings were not seriously challenged on appeal (R. Vol. V, p. 8).

None of the employees participating in any of the acts of omission or commission had anything to do with the presentation by the respondent of its claims for fixed fees, or knew anything about the presentation of claims, false or otherwise, for the payment of fees, or any other sums due under the contract. Not only was there no showing that any of the employees who participated in any of the acts complained of had anything to do with the actual presentation of the claims, but there was no showing that any of such employees committed the acts for the purpose of obtaining or aiding in the obtaining of the payment of such

claims, true or false. It is only upon the theory (false in fact as well as in law) that such acts resulted in a failure to perform the contract, and that by reason of such failure the fixed fees had not been earned and that the claims therefor were false, that this suit is based. However, as we have pointed out, the contract was, in fact, performed and the fixed fees were legally due to respondent when the claims therefor were presented.

(a) **Such Limitation of Liability Clauses Are Valid and Enforceable.**

There is nothing new or novel about such limitation of liability clauses. They are widely used and, when properly drawn, are universally upheld. It may be stated as a well-settled rule that a corporation may by contract limit its liability to the personal conduct or knowledge of its corporate officers or top management employees, so long as it does not seek to relieve itself from liability for the fraud or gross negligenec of such officers or employees. *Browning v. Fidelity Trust Co.*, 250 F. 321, cert. denied 248 U. S. 564; *Hazzard v. Chase National Bank of City of New York*, 287 N. Y. S. 541, 159 Misc. 57, affirmed 14 N. Y. S. (2d) 147, affirmed 282 N. Y. 652, rehearing denied 283 N. Y. 682, cert. denied 311 U. S. 708; *Benton v. Safe Deposit Bank of Pottsville*, 255 N. Y. 260, 174 N. E. 648; *Dun v. City National Bank*, 58 F. 174; *Speck v. Wylie*, 1 Cal. (2) 625, 36 P. (2d) 618, 95 A. L. R. 760; *Pearson & Son v. Dublin* (1907), A. C. 351; *Annotation*, 158 A. L. R. 276, 83 A. L. R. 616, 57 A. L. R. 470; *Restatement of the Law of Trusts*, Sec. 222; *Restatement of the Law of Agency*, Sec. 260; *3 Williston on Contracts*, Sec. 811, p. 2277.

(b) **They Are Not Covenants Against the Respondent's Own Fraud.**

It is, of course, true, as the Court of Appeals pointed out, that a covenant of immunity which purports to protect one against his own fraud is invalid. But surely

the covenants in the contract in the present case are not covenants against liability for the fraud of the respondent, or for the fraud of its officers or representatives having supervision and direction of the plant as a whole. Instead such fraud is carefully excepted from the scope of the covenants, by making the respondent liable for the failure to exercise "good faith." They purport to give indemnity and immunity only against liability for the acts of others, i. e., of those minor employees for whose unauthorized acts respondent was not willing to assume liability, and we know of no case, and none has been cited in the Government's petition, which states or even suggests that covenants of that character are void and unenforceable. Instead, as pointed out above, the authorities expressly hold that covenants of such character are valid and binding and should be enforced in accordance with their terms.

(c) **They Are Not in Violation of any Statute.**

There is nothing in the covenants in the contract in this case which undertakes to abridge the welfare of the general public, or to relieve the respondent of any duty imposed upon it by the False Claims Act. That Act does not make the respondent liable for the negligent acts of its employees, or even for the fraudulent acts of its employees, unless such acts constitute the particular kind of fraud covered by the statute, i. e., the presentation of false claims, or the using of false certificates to obtain payment of false claims. That Act does not prohibit or make illegal any of the isolated irregular acts of omission or commission complained of in this case such as the failure to adjust properly or to shut down machines when not functioning correctly, the omission of inspection operations, or the doing of any of the acts described in the complaint. Nor is there anything in that Act to the effect that such unauthorized acts, even if known to the employer, would make

the claims for payment false claims within the meaning of the Act. Nor is there anything in that Act which says that the knowledge of any employee engaged in the alleged irregularities is to be imputed to the employer, so as to satisfy the requirement of the Act that the employer must "know" the claims to be false, fictitious or fraudulent, and must thereby have a conscious intent to defraud.

(d) **They Are Not Contrary to Public Policy.**

It is, of course, true that a limitation of liability clause which contravenes public policy would be invalid. But, in the Government's petition no authority is cited, and we know of none, which prohibits a contractual agreement relieving a corporation from liability of acts of certain of its employees under circumstances such as we have here, especially where the parties entering into the contract stand on an equal footing in so far as bargaining power is concerned; nor do we know of any public policy which says that the knowledge of employees of their own irregular acts must be imputed to their employer and that, upon the basis of such imputed knowledge, an intent to defraud must be inferred, when the facts show the utmost good faith and a complete absence of any conscious fraudulent intent.

On the contrary, this contract, executed by a qualified representative of the Government, acting within the scope of his authority, represents and embodies public policy with respect to this particular matter. Being a contract made by the sovereign power itself, it can hardly be said that its provisions are contrary to the policy of such sovereign power, especially where it does not conflict with the False Claims Act and is not contrary to any definitive, overriding public policy. *Muschany v. United States,* 324 U. S. 49, 66; *Twin City Pipe Line Co. v. Harding Glass Co.,* 283 U. S. 353, 356. When this contract was duly authorized and executed its provisions thereupon became the

public policy of the Government with respect to the operation of the St. Louis Ordnance Plant.

(e) **The Contracting Officer Had Full Authority to Execute the Contract Containing the Limitation of Liability Provisions.**

(i) **The Government has general contracting powers.**

Except where specifically restricted by statute, the Government, in the exercise of its constitutional powers, has the same right, power and authority to contract as do individuals or private corporations. As the Supreme Court said in the case of *Perkins v. Lukens Steel Co.*, 310 U. S. 113, l. c. 127:

> "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."

For somewhat broader statements of this principle, see, also, *65 Corpus Juris 1310* and *54 American Jurisprudence 570*.

The Government, in the exercise of this broad power to fix the terms and conditions upon which it will deal, undertook to agree with the respondent as to the scope, extent and character of the work to be performed, and of the obligations which the respondent was to assume under the contract in question, and to define the same with considerable particularity. Because of the obvious risks and dangers involved, the respondent was willing to obligate itself to do certain things and to be responsible in certain respects, but was not willing to assume other obligations and other liabilities, and came to a complete agreement with the Government. The respondent was not willing to contract to do the work on a fixed-price basis, but was

willing to, and did, agree with the Government to do it on the basis of cost-plus-fixed-fees. By this provision the Government relieved the respondent of the risk inherent in a fixed-price contract, but there can be no doubt about the validity of such a provision, since cost-plus-fixed-fee contracts occupy a major place in the Government's procurement policy.

Respondent was not willing to assume liability for losses not compensated by insurance, damage to materials and supplies, or to assume any risk incident to its custody and control of all raw materials, work in process and completed ammunition, the title to which was in the Government, and the Government undertook to relieve it of such liability. There would appear to be no question about the validity of such provisions. *United States v. Bethlehem Steel Corp.*, 315 U. S. 289, 293.

Not only the respondent, but the Government, obligated themselves to be bound by the decision of the Contracting Officer on all disputes concerning questions of fact arising under the contract. There would appear to be no doubt about the validity of such provision. *United States v. Mason & Hanger*, 260 U. S. 323.

Because of its experience in the business, respondent was not willing to guarantee to produce ammunition, all of which should be perfect, and to be responsible for ammunition finally rejected by the Government, but was willing to agree, and did agree, merely to make every reasonable effort to manufacture ammunition conforming to the specifications, on condition that the Government should recognize that variances therefrom were unavoidable and that the respondent should not be responsible for ammunition finally rejected. When this contract was before the Supreme Court in the case of *Powell v. The United States Cartridge Co.*, 339 U. S. 497, 525, it was not suggested that there was any question as to the validity of this provision.

The Government not only undertook to bear all of the expenditures "but all the risks of operation"; and there would appear to be no question about the validity of such provision. *Powell v. The United States Cartridge Co.*, 339 U. S. 497, 531.

Likewise, the respondent knew that in the course of the performance of this contract, and in the performance of the vast number of separate manufacturing, inspecting, packing and delivering operations which would have to be performed by many thousands of employees, there would, at times, be failures by individual employees to do what they were supposed to do, or to refrain from doing what they were supposed not to do, and the respondent was not willing to assume liability for such acts. The respondent was willing to undertake, and did undertake, to use its best efforts to manufacture ammunition that would comply with its specifications, but was not willing to undertake the operation of the St. Louis Ordnance Plant if it was to be held liable for the negligent and willful acts of omission or commission on the part of its thousands of lower level employees, and the Government agreed to this limitation of the respondent's obligation.

Thus, the limitation of liability clauses were merely designed to set certain specific limits upon the scope and extent of the obligations which the respondent assumed in the performance of the work called for by the contract. Only because, under the Government's theory of this case, the assertion of liability under the False Claims Act is necessarily based upon "liability for each and every act of each and every employee involved in the activities complained of" (R. Vol. I, p. 375), an obligation which the respondent did not assume, and which the Government specifically agreed it should not assume, do these limitation of liability clauses defeat the Government's claim.

(ii) **The Government is bound by its contracts.**

It is elementary that if the Government has the power to enter into a contract, it is bound by the terms thereof. *United States v. Bethlehem Steel Corp.*, 315 U. S. 289, 310, 312; *United States v. Standard Rice Co.*, 323 U. S. 106, 111; *Perry v. United States*, 294 U. S. 330, 352; *Muschany v. United States*, 324 U. S. 49, 66.

(iii) **The contracting powers of the Secretary of War.**

The contract in this case was not executed by a Government agent of unknown and limited powers, but by Brigadier General L. H. Campbell, Jr., as Contracting Officer, and was expressly approved "By direction of the Secretary of War" by Robert P. Patterson, the Assistant Secretary of War. As stated in the case of *Dayton Airplane Co. v. United States*, 21 F. (2d) 673, 674:

> "The Government was acting by the **Secretary of War**, in a national emergency of the first class. **His discretion was unlimited**; it must be exercised through subordinates; in the absence of fraud or bad faith, the exercise of such delegated authority is the Secretary's exercise of it." (Emphasis ours.)

(iv) **Statutory authority.**

In addition to the general authority of the Secretary of War, the contract here in question was executed under the specific authority of the *Act of July 2, 1940*, 54 Stat. 712; *50 U. S. C. App.*, Sections 1171, 1172, and *5 U. S. C.*, Section 189 (a), commonly known as the **National Defense Act**, and each supplement thereto beginning with Supplement No. 6, dated February 14, 1942, by authority of the *Act of December 18, 1941*, known as the **First War Powers Act.**

The National Defense Act specifically authorized the Secretary of War to provide for the operation of plants such as the St. Louis Ordnance Plant through the agency

of commercial manufacturers "under such terms and conditions as he may deem advisable." Thus the Secretary of War, in addition to his general authority over matters within his jurisdiction, was given broad authority direct from Congress to enter into the contract in question.

Now, it is not contended that Congress specifically authorized the Secretary of War to insert limitation of liability clauses in the contract. Nor is it contended that Congress specifically authorized the Secretary of War to waive or suspend the provisions of the False Claims Act or to immunize the respondent from liability under that Act, but it is clear that the Secretary of War was given authority, in his discretion, to fix the "terms and conditions" of the contract, so long as they did not violate specific statutory prohibitions, and, in the exercise of such discretion, he was authorized to agree to and fix certain specific limits upon the scope and extent of the obligations which the respondent should assume in the performance of the work called for by the contract.

(v) **The limitation of liability clauses are non-severable parts of the contract.**

The record shows that the respondent refused to accept the contract without these limitation of liability clauses (R. Vol. II, p. 762). The contract is a whole and must be enforced as such. *United States v. Bethlehem Steel Corp.*, 315 U. S. 289, 298; 3 *Williston on Contracts, Revised Edition*, Section 863, p. 2422 et seq.

(vi) **The question as to the Contracting Officer's authority may not be raised for the first time on appeal.**

Although, as pointed out above, there would seem to be no real question as to the authority to include the limitation of liability clauses in the contract, it should be noted that this question was raised for the first time on appeal. The Trial Court specifically pointed out (R. Vol. I, p. 376)

that "the Contracting Officer's authority has not been questioned."

Since it was not raised in the Trial Court, it was too late to raise it in the Court of Appeals, as has been expressly held in the cases of *Atlantic Brewing Co. v. William J. Brennan Grocery Co.*, 79 F. (2d) 45, 46 (8th Cir.), and *Falstaff Brewing Corp. v. Iowa Fruit & Produce Co.*, 112 F. (2d) 101, 106 (8th Cir.).

CONCLUSION.

We believe these truths about this case to be self-evident:

First, neither of the Courts below decided that a War Department Contracting Officer was empowered by the Act of July 2, 1940, or otherwise, to limit the respondent contractor's liability, under the False Claims Act, for defrauding the United States.

Second, all that the Courts below did decide was, in essence, that in a case where corporate knowledge of an employee's wrongdoing is an essential element of liability, and the corporation has no actual knowledge thereof, the employee's knowledge of his own wrongdoing will not be imputed to the corporation where, by contract, the claimant has undertaken to limit the liability of the corporation for any acts of omission or commission on the part of its employees to "personal" failure on the part of the corporate officers and certain of its responsible representatives.

Third, the decisions of the Courts below dismissing the cause of action are clearly correct and should be sustained upon the grounds stated therein, as well as upon other grounds which have only been suggested in this brief.

Fourth, no important question of Federal law has been decided, nor has any Federal question been decided in a way in conflict with applicable decisions of this Court.

Fifth, the Government has had its day in Court, and no reason has been shown why any technical rule or the ends of justice require that it be given an opportunity to relitigate this case in the Supreme Court.

We respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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